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PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY,

INTENDED FOR

THE USE OF STUDENTS IN CONVEYANCING.

BY

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PREFACE.

THE following pages are intended as supplementary to the author's "Principles of the Law of Real Property." At the time when that work was written, the plan of the present treatise was not matured, and a chapter "On Personal Property and its Alienation" was inserted in that work. The contents of that chapter will be found interspersed in parts of the present volume; and should a second edition of the Principles of the Law of Real Property be called for, it is the author's intention to omit that chapter of his former work, and to supply its place by some further remarks on such elementary parts of the law of real property as may appear to have been but slightly touched upon before. The very favourable reception which the author's work on the law of real property has met with from the profession, has encouraged him to undertake in the present work a task, he believes, hitherto unat-

tempted. For it is singular that, notwithstanding the rapid growth and now enormous value of personal property in this country, no treatise has yet appeared having for its object the introduction of the student in conveyancing to that large and increasing portion of his study and practice which comprises the law relating to such property. As to real property, he may take his choice amongst three or four publications, all having the same object of facilitating his studies; but the law of personal property, though sufficiently treated of in all that relates to it as purely mercantile, has not yet had any elementary treatise on its principles, so far as they affect the practice of conveyancing. The present work is an attempt to supply this deficiency, and, in conjunction with the author's *Principles of the Law of Real Property*, to afford the student a brief and simple introduction to the whole system of modern conveyancing. The novelty of the attempt has, however, increased the difficulty of the task. The author has endeavoured proportionably to increase his diligence and care. He can, however, scarcely hope to have escaped all errors. And here he would caution the student against too implicit a

reliance on the dicta of text books. Elementary books cannot from their nature be completely accurate. As helpers to more perfect knowledge, they may be most valuable. But it would be as great a mistake for a student to remain satisfied with his knowledge of a text book, as for an author to compress into an elementary work all that could possibly be said on the subject.

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TABLE OF CONTENTS.



	Page
INTRODUCTORY CHAPTER.	
OF THE SUBJECTS AND NATURE OF PERSONAL PROPERTY .	1



PART I.

OF CHOSSES IN POSSESSION	9
--------------------------------	---

CHAP. I.

OF CHATTELS WHICH DESCEND TO THE HEIR	9
---	---

CHAP. II.

OF TROVER, BAILMENT AND LIEN.....	21
-----------------------------------	----

CHAP. III.

OF THE ALIENATION OF CHOSSES IN POSSESSION	31
--	----

CHAP. IV.

OF SHIPS	48
----------------	----



PART II.

OF CHOSSES IN ACTION.....	55
---------------------------	----

CHAP. I.

OF ACTIONS EX DELICTO	55
-----------------------------	----

CHAP. II.

OF CONTRACTS	60
--------------------	----

	Page
CHAP. III.	
OF DEBTS	83
CHAP. IV.	
OF BANKRUPTCY	107
CHAP. V.	
OF INSOLVENCY	126
CHAP. VI.	
OF INSURANCE	133
CHAP. VII.	
OF ARBITRATION	137



PART III.

OF INCORPOREAL PERSONAL PROPERTY....	148
--------------------------------------	-----

CHAP. I.

OF PERSONAL ANNUITIES, STOCKS AND SHARES	148
--	-----

CHAP. II.

OF PATENTS AND COPYRIGHT	171
------------------------------------	-----



PART IV.

OF PERSONAL ESTATE GENERALLY	186
--	-----

CHAP. I.

OF SETTLEMENTS OF PERSONAL PROPERTY	186
---	-----

CHAP. II.

OF JOINT OWNERSHIP AND JOINT LIABILITY	217
--	-----

CHAP. III.

OF A WILL	233
---------------------	-----

CHAP. IV.

OF INTESTACY.....	256
-------------------	-----

CHAP. V.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.....	259
---	-----



PART V.

OF TITLE	290
----------------	-----



APPENDIX (A.)	307
APPENDIX (B.)	310
APPENDIX (C.)	315
INDEX	329

INDEX OF CASES CITED.

A.	Page
Abbot v. Blofield	275
Abingdon, Lord, Clarke v. ..	94
Ackerman, Ex parte	227
Acton v. Acton	249
— v. White	283
— v. Woodgate	215
Adam v. Statham	144
—, Wilkinson v.	252, 253
Adams, Malkin v.	108
— v. Paynter	210
Addenbrooke, Foley v. ..	219
Addison v. Round	23
Adney, Wemall v.	65
Aflalo v. Grove	38
Agar v. Lisle	22
— v. Macklew	138
Aireton v. Davis	88
Aitcheson v. Cargey	143, 144
Alexander v. Alexander ..	199
—, Dover v.	252
Alford, Sunbolf v.	27
Allen, Brown v.	248
—, Festing v.	194
Alleyn v. Alleyn	250
Alsager v. Spalding	104
Amicable Assurance Society v. Bolland	134
Amies v. Skillern	218
Amyot, Browne v.	190
Anderson v. Coxeter	145
— v. Martindale	219
Andrews, Kemp v.	220
— v. Partington	204
— Windle v.	74
Angerstein, Tidswell v. ..	135
Angier v. Stannard	211
Annandale, Brown v.	173
Anon.	46, 120, 143
Antrobus v. Smith	32
Appleby, Pickering v.	153
Arabin, Humphrey v.	135
Archer v. Gardner	277

	Page
Archer v. Marsh	79
Armistead, De Begnis v. ..	76
Armory v. Delamirie	23
Armstrong, Newbury v. ..	68
Arnold, Rawsthorn v.	145
Ashburner, Fletcher v. ..	208
— v. M'Guire	249
Ashby v. Ashby	278
—, Vere v.	229
Ashford, Davies v.	203
Ashley v. Ashley	134
Askew, Casey v.	235
Aspinall v. Pickford	28
Aston, Harvey v.	270
Atcheson, Scarpellini v. ..	276
Atherton, Lackington v. ..	39
Atkinson v. Bell	36
Attorney-General v. Bouwens ..	244
— v. Davison	143
— v. Graves	251
— v. Hope	244
— v. Malkin	163
—, March v.	252
— v. Meyrick	251
— v. Tyndall	252
Attwood v. Munnings	293
Aubert v. Maze	76
Aubin v. Daly	149
Ayton v. Ayton	254

B.

Badcock, Saddlers' Company v. ..	135
Badger, in re	144
Bagley v. Mollard	252
Bagwell v. Dry	254, 255
—, Law v.	215
Bain v. Lescher	254
Bainbridge, Hedley v.	231
Bainbridge v. Blair	210
Baine, Willing v.	218
Bainton v. Ward	195

	Page		Page
Baker v. Henderson	29	Beard v. Egerton	174, 175
—, Leonard v.	129	Beaufort, Duke of, Wellesley v. ..	286
Balch v. Symes	29	Beckett, Donaldson v.	178
Baldehy v. Parker	37	Beckford, Greening v.	302
Baldry, Norman v.	246	Beckham v. Drake	226, 229
Baldwin, Lloyd v.	209	Bell, Atkinson v.	36
Balfour v. Welland	209	— v. Banks	100
Balguy, Broadhurst v.	211	—, Bowlby v.	168
Ball, Caldwell v.	54	—, Hobson v.	303
Bamford, Brown v.	284	—, Meux v.	301
Bank of England, Churchill v. ..	156	—, Sanderson v.	27
—, Franklin v.	157	Bellaris, Brown v.	214
—, Lunn .. 155, 157		Bellasis v. Ermine	270
— v. Moffatt	157	Belton v. Hodges	103
— v. Parsons	157	Benedict, Montague v.	280
—, Richardson v.	162	—, Seaton v.	280
Banks, Bell v.	100	Bennett v. Burton	150
Banner v. Lowe	191	— v. Daniel	85
Bannister, Haley v.	204	Bennington v. Wallis	77
Barber v. Barber	85, 254	Bensley v. Bignold	76
— v. Fox	93	Benson v. Benson	283
—, Knight v.	153, 168	— v. Maude	246
—, Mills v.	72	Bentall v. Burn	38
Barchard, Savill v.	28	Benyon v. Maddison	192
Barclay v. Wainewright	190	Bern, Hardy v.	95
Bardell, Rex v.	140	Bernard, Coggs v.	24
Barham, Moor v.	263	Berney, West v.	199
—, Power v.	293	Berriman v. Peacock	17
Baring v. Day	27	Berrington v. Evans	90, 213
Barker v. Lea	277	Betts v. Kimpton	276
—, Stamper v.	285	Bevan, Ex parte	227
— v. Stead	232	— v. Walters	27
Barlow, Errat v.	204	Bewit, Whitfield v.	17
Barnard, Earl of Glengall v. ..	251	Biddell v. Leeder	78
—, Lyde v.	72, 301	Biddlecombe v. Bond	126
Barnes, Skey v.	203	Biffin v. Yorke	88
Barnett, Brandao v.	28	Bignold, Bensley v.	76
—, Van v.	208	Bill v. Careton	215
Barrett v. Parry	142	Billingsley, Lady Shore v. ..	218
Barrie, Glover v.	143	Bimington v. Wallis	65
Barrow, Lysons v.	242	Bird v. Boulter	39
Barry v. Neesham	229	— v. Gammon	71
Barsham, Casborne v.	232	—, Morley v.	218, 254
Bartholomew, Drybutter v. ..	159	— v. Relph	59
Bartlett, Ex parte	286	Bishop, Kerswill v.	54
— v. Gillard	250	Bishop v. Colebrook	279
Barton v. Barton	269	Bittleston v. Cooper	83
— v. Briscoe	283	Black, Willis v.	213
Bartrop, Eyre v.	100	Blackburn, Hobson v.	252
Bassett, Way v.	226	Blackburne, Stode v.	12
Bastard, Nicolls v.	25	Blacklow v. Laws	282
Bate, Hunt v.	62	Blair, Bainbrigge v.	210
Bateman v. Davis	206	— v. Bromley	230
— v. Ross	285	Blake v. White	100
Bates v. Cooke	137	Blacklock, Stevenson v.	28
Bath, Ex parte	108	Bland, Ex parte	51
Battersby v. Smyth	50	Blantern, Collins v.	76
Beale v. Beale	199	Bligh v. Brent	220

	Page		Page
Blight, Loveacres <i>d. Mudge v.</i>	222	Brandon <i>v. Robinson</i>	283
Blisset <i>v. Cranwell</i>	222	Brathwaite, Lamplough	62
Blofield, Abbot	275	Breary, Roundell	213
Blount <i>v. Burrow</i>	237	Brent, Bligh	220
Bloxam <i>v. Sanders</i>	39, 41	Brett <i>v. Greenwell</i>	277
— <i>v. Elsee</i>	175, 176	Briant, Philpot	100
Blunden <i>v. Desart</i>	29	Brice <i>v. Stokes</i>	211
Blurton, Kirk	230	Bridge <i>v. Cage</i>	78
Blythe <i>v. Granville</i>	213	— <i>v. Yates</i>	218
Boldero, Godsall	134	Bridges, Etty	302
Bolland, Amicable Assurance So-		Briggs <i>v. Sowry</i>	120
ciety	134	— <i>v. Wilkinson</i>	51
— <i>v. Disney</i>	134	Bright, Jones	294
Bollett, Burnby	293	Briscoc, Barton	283
Bond, Biddlecombe	126	Brisc, Matthews	205
—, Smith	94	Bristead <i>v. Wilkins</i>	156
Booth <i>v. Booth</i>	211	Bristow <i>v. Warde</i>	199
—, Martindale	44	Britain, Braithwaite	226
—, Whale	245	Broadhurst <i>v. Balguy</i>	211
Boothby, Morley	67	Bromhead, Wilkins	36
Borman, Scarborough	282, 283	Bromley, Blair	230
Boss <i>v. Godsall</i>	207	Brooke <i>v. Mitchell</i>	23, 141, 142
Botfield, Bradburne	219	Brookes, Ex parte	110
Boucher, Prescott	276	Broom <i>v. Broom</i>	220
Boughton, Lord St. John	295	Brown <i>v. Allen</i>	248
Boulter, Bird	39	— <i>v. Annandale</i>	173
Boulton <i>v. Bull</i>	174	— <i>v. Bamford</i>	284
Bourne, Dowbiggen	99	— <i>v. Bellaris</i>	214
—, Hawken	230	— <i>v. Edgington</i>	294
Bouwens, Attorney-General	244	—, Jennings	65
Bowden, Jones	294	— <i>v. Lee</i>	99
Bower <i>v. Marris</i>	103, 121	— <i>v. Pocock</i>	283
—, Mexborough	138	—, Richardson	293
Bowen, Grymes	14	— <i>v. Vawser</i>	147
Bowes, Countess of Strathmore	280	—, Wakefield	219
Bowker, Wilmshurst	41	— <i>v. Weatherby</i>	226
Bowlby <i>v. Bell</i>	168	Browne <i>v. Amyot</i>	190
Bowles's case	17	— <i>v. Cavendish</i>	216
Bowman, Mullen	255	Brownrigg, Bryson	237
Bowser <i>v. Cox</i>	100	Brownsmith, Wilson	249
Bowsher, Davis	28	Bryan, Hemsworth	141
Boydell <i>v. M'Michael</i>	15	Bryans <i>v. Nix</i>	34
Boyle <i>v. Bishop of Peterborough</i>	198	Bryant, Hollis	127
Bradburne <i>v. Botfield</i>	219	—, Laythorp	60
Bradley <i>v. Copley</i>	23, 44	Bryce, Cannan	76, 80
—, Hampshire	211	Bryson <i>v. Brownrigg</i>	237
— <i>v. Hughes</i>	283	Buck, Sutton	25
—, Perkins	43	Buckingham, Earl of, <i>v. Drury</i>	271
—, Wren	284	Buckley, Earl of Stafford	149
Bradsey <i>v. Clyston</i>	142	—, Ex parte	229
Bradshaw, Custance	220	Bull, Boulton	174
—, Yeoman	95	Bunn <i>v. Markham</i>	237
Brady, Burridge	230	Burdiss, Carr	34
Braithwaite <i>v. Britain</i>	226	Burgess, Tappenden	105
— <i>v. Skinner</i>	6	—, Williams	88
Bramah <i>v. Roberts</i>	231	Burghart, Lane	63, 122
Brandao <i>v. Barnett</i>	28	Borke <i>v. Jones</i>	298
Brander <i>v. Brander</i>	190	Burn, Bentall	33

	Page		Page
Burn v. Burn	230	Cave v. Cave	15
Burnby v. Bollett	293	— v. Roberts	265
Burnell, Gale v.	31, 34	Cavendish, Browne v. ..	216
Burnet v. Mann	262	Chadwick v. Doleman ..	199
Burridge v. Brady	250	Chaffers, Linnit v. .. .	89
Burrough v. Moss	275	Chaloner, Horsley v. .. .	246
Burrow, Blount, v. .. .	237	Chamberlain v. Williamson	58
Burton, Bennet v.	130	Chambers, Willet v. .. .	230
—, Goode v.	11	Champernown v. Scott ..	29
— v. Hughes	26	Chandler, Kensington v. ..	214
Bury, Petrie v.	217	Channon v. Patch	17
Bush v. Shipman	104	Chanter v. Hopkins	293
Bushel v. Wheeler	27	Chaplin, Ex parte	205
Busk v. Davis	36	— v. Rogers	33
—, Pickering v.	292	Chapman, Howse v. .. .	251
Butcher v. Jackson	201	—, May v.	75
Butler, Falkner v. .. .	199	—, Nicholson v.	27
Butterfield, in re	228	Charlesworth, Malcomb v. ..	278
Byers, Wilkinson v. .. .	103	Chase, Goodman v.	68
Byng v. Lord Strafford ..	192	Check, Shortrede v.	68
Byrne, Ward v.	78	Cheslyn v. Dalby	70
Byron v. Byron	66	Chichester, Smith v. .. .	29
Bywater, Wrightson v. ..	143	Child v. Morley	152
C.		Chiswell, Gray v.	226
Cage, Bridge v.	78	Chitty, Hulme v.	285
Caldwell v. Bail	54	Cholmeley v. Paxton .. .	17
Calvert v. London Dock Com-		Churchill v. Bank of England	156
pany	100	— v. Small	12
Campbell v. Campbell	210	Churchward v. Studdy .. .	20
— v. Home	200	City of London Steam Packet	
—, Macarthur v.	145	Company, Fenton v. .. .	54
Cannan v. Bryce	76, 80	Clancy v. Piggott	67
Cannings v. Flower	204	Claridge, Hollis v.	29
Careless, Rachfield v. .. .	255	Clarke v. Lord Abingdon ..	94
Carey v. Askew	235	—, Groves v.	277
—, Collins v.	210	— v. Parker	270
Cargie v. Aitcheson	143	—, Rawlinson v.	229
—, Aitcheson v.	144	—, in re	229
Carlisle, Earl of, Lechmere v. ..	203	— v. Seton	94
Carpenter v. Smith	173	— v. Shee	290
—, Tebbs v.	150	—, Smith v.	73
Carr v. Burdiss	34	Clarkson, Wild v.	94
Carrington, Ex parte	108	Clayton v. Kynaston .. .	223, 225
Carruthers, Parkin v. .. .	228	Clegg v. Clegg	213
Carstairs, Ex parte	100	Cliff v. Schwabe	134
—, Maltby v.	100	Close v. Waterhouse	28
Carter, Skey v.	89	Clough v. French	92
— v. Whalley	228	— v. Lambert	235
Cartwright v. Vawdry .. .	252	Clyston, Bradsey v.	142
Carver, Waugh v.	230	Cobb, Rishton v.	269
Casborne v. Barsham	232	Cock, Lashbrook v.	222
Case, Hartley v.	74	Cockburn, Daubeney v. ..	200
—, South Carolina Bank v. ..	230	Cocksedge v. Cocksedge ..	284
Cassell, in re	146	Coggs v. Bernard	24
Caulfield v. Maguire	99	Coker, Hitchcock v. .. .	79
		Colbeck, in re	229
		Cole, Kearsley v.	225
		—, Kerrison v.	77

	Page
Colebrook, Bishopp v.	279
Colegrave v. Dias Santos	14
Collector of Customs, Rex v. . . .	220
Collett, Meryon v.	193
Collins v. Blantern	76
— v. Carey	210
—, Lowndes v.	98
— v. Martin	75
— v. Stone	88
Collinson, Holderness v.	28
Colston v. Morris	285
Combe, Ward v.	190
Compton, Peter v.	68
—, Right d. Compton v.	270
Conduitt v. Soane	188
Congreve, Douglas v.	213
Cooke, Bates v.	137
—, Stones v.	286
— v. Whorwood	144
Cookson v. Cookson	220
— v. Reay	208
Coope v. Twynnam	99
Cooper, Bittleston v.	88
—, Davidson v.	76
— v. Johnson	141
—, Loveridge v.	300, 302
—, Rust v.	120
— v. Shepherd	42
— v. Willomatt	26
Cope v. Rowlands	77
Copis v. Middleton	98
Copley, Bradley v.	23, 44
Coppin, Dillon v.	32, 64
Corbet, Ewer v.	245
Cordell, Elliott v.	278
Cornwallis, Lassells v.	195
Coventry v. Coventry	210
Coventry, Lord, Lygon v.	205
Cowell v. Simpson	28, 29
Cox, Bowser v.	100
Coxeter, Anderson v.	145
Craddock, Lake v.	220
Craig, Downes v.	59
Crallan v. Oulton	298
Craneheldt, Freake v.	298, 299
Cranley v. Hillary	104
Cranmer's case	250
Cranwell, Blisset v.	222
Craythorne v. Swinburne	99
Creed v. Perry	279
Creswell, Green v.	68
Cristall, Ferguson v.	23, 26
Crofton v. Poole	123
Crompte, Martin v.	220
Crosby v. Crouch	120
Crossfield v. Stanley	89
Crouch, Crosby v.	120

	Page
Croydon Canal Company, Hodges v.	296
Cruise v. Hunter	286
Cullingworth v. Loyd	104
Cumber v. Wane	102
Cunynghame v. Thurlow	200
Cureton, Bill v.	215
Curling v. Flight	303
Custance v. Bradshaw	220
Cutbush v. Cutbush	228
Cuthbert v. Dobbin	86
Cutten v. Sanger	214

D.

Dabbs, Ford v.	127
Dalby, Cheslyn v.	71
Dale, Drayton v.	123
Daly, Aubin v.	149
Dalzell, Lynch v.	135
Daniel, Bennett v.	85
— v. Dudley	193
—, Kirwan v.	216
Dartmouth, Lord, Howe v.	150
Danbeney v. Cockburn	200
Davenport, Elliot v.	193, 253
—, Ex parte	34
— v. Whitmore	50
David, Jones v.	99
Davidson v. Cooper	76
Davies v. Ashford	208
— v. Humphreys	99
— v. Penton	61
— v. Vernon	10, 12, 28
Davis, Aireton v.	88
—, Bateman v.	26
— v. Bowsher	28
—, Busk v.	79
— v. Johnston	50
— v. Mason	79
—, Shepley v.	36
—, Wilks v.	138
Davison, Attorney-General v.	143
Dawes v. Peck	38, 41
Day, Baring v.	27
—, Hulkes v.	156
—, Wallis v.	79
Deakle, Payne v.	142
Dean v. Hogg	54
— v. M'Ghie	64
Dearle v. Hall	300, 302
De Begnis v. Armistead	76
De Blaquiére, Hunt v.	286
—, Vandergucht v.	286
Dedire, Freemoult v.	213
Deeks v. Strutt	6

	Page		Page
Deering v. Earl of Winchelsea ..	99	Dupleix v. De Proven ..	90
Delamirie, Armory v. ..	28	Durant, James v. ..	213
De la Garde v. Lempriere ..	277	—— v. Prestwood ..	263
De Mautort v. Saunders ..	226	Durnford v. Lane ..	271
De Pass, Lyons v. ..	291	Dutens, Dundas v. ..	155
De Proven, Dupleix v. ..	90	Dutton v. Morrison ..	105
Desanges, Thomas v. ..	118	Du Vigier v. Lee ..	296
Desart, Blunden v. ..	29	Dykes, Tolson v. ..	132
Detastet, Ex parte ..	227		
Devaynes v. Noble ..	103, 226		
Dewdney, Ex parte ..	298		
Dias Santos, Colegrave v. ..	14		
Dickie, Gibson v. ..	63		
Dickinson v. Valpy ..	231		
Dillon v. Coppin ..	32, 64		
Dimsdale v. Robertson ..	138, 142		
Disney, Bolland v. ..	134		
Dixie, Wood v. ..	46		
Dixon, Fisher v. ..	15		
—— v. Yates ..	33, 39, 40		
Dobbin, Cuthbert v. ..	86		
Dobree, Ruddell v. ..	237		
Dodd, Lewen v. ..	222		
Due d. Esdaile v. Mitchell ..	118		
—— d. Stace v. Wheeler ..	239		
Dolman, Chadwick v. ..	199		
Donaldson v. Beckett ..	178		
Donellan v. Reid ..	69		
Doran v. Wiltshire ..	209		
Dorrien, Lucas v. ..	34		
Dorril, Routledge v. ..	199, 201		
Douglas v. Congreve ..	213		
—— v. Russell ..	54		
Dover v. Alexander ..	252		
Dowbiggen v. Bourne ..	99		
Downes, Ex parte ..	116		
—— v. Craig ..	59		
Dowson, Pickering v. ..	294		
Drake, Beckham v. ..	226, 229		
Drayton v. Dale ..	123		
Driver v. Scott ..	211		
Drury, Earl of Buckingham v. ..	271		
—— v. Scott ..	213		
Dry, Bagwell v. ..	254, 255		
Drybutter v. Bartholomew ..	159		
Drummond, Evans v. ..	228		
——, McCleod v. ..	245		
—— v. Parish ..	235		
Dubost, Ex parte ..	33		
——, Morell v. ..	85		
Dudley, Daniel v. ..	193		
—— v. Warde ..	14		
Duff v. East India Company ..	230		
Duffield v. Elwes ..	237		
Duke, Samuel v. ..	291		
——, Sheppard v. ..	295		
Dundas v. Dutens ..	155		
Dungannon, Lord, Ker v. ..	188		
		E.	
		East India Company, Duff v. ..	230
		Eastwood v. Kenyon ..	62, 65
		Ede, Mitchel v. ..	34
		Edgeberry v. Stephens ..	174
		Edgington, Brown v. ..	294
		Edmonds, Goodtitle d. Richards v. ..	192
		Edsun, Smarte v. ..	224
		Edwards v. Freeman ..	259
		——, Gervais, v. ..	138
		—— v. Harben ..	44
		—— v. Jones ..	32, 215, 237
		—— v. Countess of Warwick ..	191
		Egerton, Beard v. ..	174, 175
		Elliot v. Davenport ..	193, 253
		—— v. Merriman ..	245
		Elliott v. Cordell ..	278
		Ellis v. Nimmo ..	64
		Ellison v. Ellison ..	33, 215
		—— v. Elwin ..	271, 278
		Elsee, Bloxham v. ..	175, 176
		Elton, Ex parte ..	226
		Elwes, Duffield v. ..	227
		——, Forrest v. ..	151, 211
		Elwin, Ellison v. ..	271, 278
		Enderby, Brooke v. ..	228
		England v. Downs ..	281
		Ermine, Bellasis v. ..	270
		Errat v. Barlow ..	204
		Espinasse, Petre v. ..	215
		Etherington v. Parrot ..	237
		Ettricke v. Ettricke ..	222
		Etty v. Bridges ..	302
		Evans, Eerrington v. ..	90, 213
		—— v. Drummond ..	228
		——, Legg v. ..	23, 29, 45
		——, Shaw v. ..	85
		Everard v. Poppleton ..	87
		Everett, Eyre v. ..	100
		—— v. Wells ..	88
		Ewer v. Corbet ..	245
		Eyre v. Bartrop ..	100
		—— v. Everett ..	100
		——, Holland v. ..	70
		Eyres v. Faulkland ..	188
		Eyton, Pott v. ..	229

F.

	Page
Falkner v. Butler	199
Farebrother v. Simmons	39
Farina v. Horne	38
Farquhar, M'Queen v.	200
Farquharson v. Cave	237
Farr, Meredith v.	253
Farrant v. Thompson	15
Farren, Kemble v.	61
Faulder, Harper v.	12
Faulkland, Eyres v.	188
Fawcett v. Fearne	47
Fearne, Fawcett v.	47
Fearnhead, Knatchbull v.	246
Fenning, Halfhide v.	138
Fenton v. City of London Steam Packet Company	54
—, Trueman v.	65
Ferguson v. Cristall	23, 26
Fergusson v. Norman	77
Festing v. Allen	194
Fetherston v. Hutchinson	78
Fettiplace v. Gorges	281
Fidgeon, Laing v.	294
Field, Northey v.	41
—, Yea v.	10
Fidler, Proudley v.	281
Fisher v. Dixon	15
— v. Pimbley	144
Fitch v. Sutton	102
Fitzer v. Fitzer	285
Fletcher v. Ashburner	208
— v. Fletcher	285
—, Lechmere v.	71
Flight, Curling v.	303
Flintoff, Horner v.	61
Flower, Cannings v.	204
Foley v. Addenbrooke	219
Foljambe, Ogilvie v.	69
— v. Willoughby	205
Fooks, Pride v.	151, 211
Ford v. Dabbs	127
— v. Jones	146
— v. Peering	12
Fordwich, Mayor of, Tomlin v. ..	143
Fores v. Holmes	78
Forrest v. Elwes	151, 211
Forth Marine Insurance Com- pany, in re	167
Foster v. Weston	98
Foudrin v. Gowdey	250
Fowler v. Fowler	250
Fox, Barber v.	93
—, Freakley v.	239
— v. Smith	144
—, Webb v.	123
Francis v. Grover	296
Franklin v. Bank of England ..	157

Page

Franklin v. Hosier	27
— v. Neate	25
Franks, Ex parte	108
Fraser v. Palmer	210
Freake v. Cransfeldt	298, 299
Freakley v. Fox	239
Freeman, Ex parte	227
—, Edwards v.	259
Freemoult v. Dedire	213
French, Clough v.	92
—, Ex parte	206
Frere, Thomason v.	221
Frowd, Moore v.	210
Fry, Ex parte	227
Fryatt, Reid v.	142
Furniss v. Leicester	293

G.

Gale v. Burnell	31, 44
—, Griffiths v.	254
— v. Walsh	74
Gammon, Bird v.	71
Gardner v. Marshall	277
Gardom, Ex parte	230
Garland, Ex parte	228
Garnet, Pierson v.	199
Garrard v. Lord Lauderdale ..	215
Gaskell v. King	77
Gaters v. Madeley	276
Gaylor, Howell v.	193
Gaze, Lane v.	255
Gee v. Gurney	200
Gervais v. Edwards	138
Gibbeson, Greenham v.	206
Gibson v. Dickie	63
Gifford, Ex parte	99, 100, 225
—, Nugent v.	245
Gill, in the goods of	258
— v. Shelley	253
Gillard, Bartlett v.	250
Gillatt, Glazbrook v.	302
Gillespie, Mestayer v.	50
Giraud, Hilton v.	252
Girdlestone, Watts v.	151, 211
Glazbrook v. Gillatt	302
Gleadow, Robinson v.	51
Glendinning, Ex parte	104
Glengall, Earl of, v. Barnard ..	251
Glover v. Barrie	143
Glynn v. Thorpe	91
Goddard, Pedley v.	145
— v. Snow	281
Godfrey v. Davis	252
— v. Turnbull	228
Godsall v. Boldero	154
—, Boss v.	207
Goldschmidt v. Hamlet	89

	Page	H.	Page
Goldsmid v. Goldsmid	199	Hadfield, Rushforth v.	28
Gomme, Hill v.	246	Haigh, Howden v.	104
Goode v. Burton	11	Hales v. Darell	250
Goodman v. Chase	68	Haley v. Bannister	204
—— v. Harvey	290	Halfhide v. Fenning	138
Goodtitle d. Richards v. Edmonds	192	Halford v. Kymer	135
—— v. North	122	Hall, Dearle v.	300, 302
Gordon v. Gordon	253	—— v. Hardy	146
—— v. Harper	23, 26	——, Heath v.	101
——, Norcott v.	250	—— v. Hugonin	279
Gorges, Fettiplace v.	281	—— v. Lawrence	146
Gould, Weldon v.	23	—— v. Palmer	77
Gouthwaite, Ex parte	110	——, Pinkney v.	229
Gowdey, Fourdrin v.	250	—— v. Potter	270
Grace v. Smith	229	——, Stanton v.	278
Graffley v. Humpage	193, 213	Halliday, Streatfield v.	224
Graham v. Graham	250	Halthin, Steinmiz v.	277
—— v. Londonderry	273, 274	Hames v. Hames	193
Grant v. Grant	94	Hamilton v. Kirwan	200
——, Rountledge v.	70	Hamlet, Goldschmidt v.	89
—— v. Vaughan	290	Hamper, Ex parte	229
Grantham v. Hawley	31	Hampshire v. Bradley	211
Granville, Blythe v.	213	Hanbury v. Kirkland	211
Graves, Attorney-General v.	251	Hancock v. Heywood	221
—— v. Weld	16	Hanforth, Howell v.	191
Gray v. Chiswell	226	Hanson v. Keating	276
Gray, Hind v.	78	—— v. Meyer	36
—— v. Mathias	77	Harben, Edwards v.	44
Great Western Railway Company,		Harcourt v. Ramsbottom	143
Rouch v.	118	Hardy v. Bern	95
Greaves v. Hepke	33	——, Hall v.	146
——, Shuttleworth v.	218	Hare v. Horton	14
Green v. Creswell	68	—— Hyat, v.	229
——, Price v.	60, 77, 79	Harewood, Lord, Milner v.	271
—— v. Wood	88	Harford, Neilson v.	175
Greene, Whitmore v.	89	Harnett v. Macdougall	284
Greenham v. Gibbeson	206	Harper v. Faulder	12
Greenhill, Rex v.	286	——, Gordon v.	23, 26
Greening v. Beckford	302	Harrington v. Price	18
Greenwell, Brett v.	277	Harris, Ex parte	226
—— v. Greenwell	204	—— v. Lloyd	128, 252
Greese, Richardson v.	250	Harrison v. Jackson	230
Gregory, Heckscher v.	152	—— v. Paynter	102
Griffin, Bishop of Hereford v.	179	Harrobin, Pole v.	76
——, Thompson v.	204	Harrop v. Howard	284
Griffiths v. Gale	254	Hartford v. Jones	27
Grove v. Afalo	38	Hartley v. Case	74
Grover, Francis v.	296	Hart v. Stephens	276
Groves v. Clarke	277	Harvey v. Aston	270
—— v. Perkins	277	——, Goodman v.	290
Grymes v. Boweren	14	Haslam, Nickels v.	175
——, Stratton v.	270	Hasleham v. Young	230
Gunn, Pawle v.	62, 153	Hawken v. Bourne	230
Gurney, Gee v.	200	Hawley, Grantham v.	31
Guthrie, Hewison v.	30	Haworth, Meyer v.	65
——, Leslie v.	54	Hay, Ex parte	227
Gutteridge, Simmons v.	240		

	Page		Page
Hay v. Palmer	191	Hogg, Dean v.	54
Hayes v. Hayes	248	Holden, Stokes v.	43
Headington, Holloway v. ..	64	Holderness v. Collinson ..	28
Heard v. Stamford	280	Holford v. Phipps	211
Heath v. Hall	101	Holland v. Eyre	70
— v. Key	100	— v. Hughes	150
Heather, Richards v.	223	Hollier, Ravenshaw v.	215
Heaver, Manser v.	143	Hollinshead, Reid v.	229
Heckscher v. Gregory	152	Hollis v. Bryant	127
Hedley v. Bainbridge	231	— v. Claridge	29
Helme v. Smith	51	Holloway v. Headington ..	64
Hembrow, Prior v.	141	Holst v. Pownal	41
Heming v. Swimmerton ..	140	Home, Campbell v.	200
Hemsworth v. Bryan	141	Honner v. Morton	279
Henderson, Baker v.	29	Hooper v. Ramsbottom ..	12
Heneage v. Hunloke	199	— v. Rossiter	190
Henning, Whittle v.	279	Hope, Attorney-General v. ..	244
Hensloe's case	240	Hopkins, Chanter v.	293
Hepke, Greaves v.	33	— v. Logan	63
Hereford, Bishop of, v. Griffin	179	—, Tugman v.	281
Herlakenden's case	16, 17	Hopkinson v. Lee	219
Hewison v. Guthrie	30	Hornby, Hoare v.	213
Heywood, Hancock v.	221	Horne, Farina v.	38
Hibbert, Simond v.	28	Horner v. Flitoff	61
Hicks, Lovell v.	230	Horsley v. Chaloner	246
Higgins v. Sargent	98	Horton, Hare v.	14
Hilbert, Tate v.	237	—, Richardson v.	223
Hill v. Gomme	246	—, Wells v.	68
—, Johnson v.	27	Hosier, Franklin v.	27
—, Rex v.	162	Hotham v. Somerville	12
— v. Spencer	77	Houghton v. Houghton ..	220
— v. Thompson	174, 175	— v. Matthews	28
Hillary, Cranley v.	104	Houlston v. Smyth	287
Hillman, Tapfield v.	51	Howard, Harrop v.	284
Hills v. Hills	237	— v. Rhodes	210
Hilton v. Giraud	252	Howarth, Samuel v.	100
Hinchcliffe v. Hinchcliffe ..	251	Howden v. Haigh	104
Hinchinbrook, Lord, Lord Ship-		Howe v. Lord Dartmouth ..	150
brook v.	211	— v. Synge	77
Hind v. Gray	78	—, Whittaker v.	79
Hindley v. Marquis of Westmeath	284	Howell v. Gaylor	193
Hinton v. Pinke	248	— v. Hanforth	191
Hiscox, Willis v.	210, 211	— v. M'Ivers	101
Hitchcock v. Coker	79	Howes, Morris v.	193
Hitchman v. Walton	14, 15	Howse v. Chapman	251
Hoadley v. Mc'Laine	37	Huetson, Squire v.	89
Hoare v. Hornby	213	Hughes, Benton v.	26
— v. Parker	188	—, Bradley v.	283
Hobson v. Bell	303	—, Holland v.	150
— v. Blackburn	252	— v. Kelly	296
Hockley, Steadman v.	29	—, Oldham v.	208
Hodge, Walter v.	237	—, Rann v.	62
Hodges, Belton v.	108	—, Stoveld v.	33
— v. Croydon Canal Com-		— v. Stubbs	215
pany	296	— v. Wynne	94, 298
Hodgson v. Loy	40	Hugonin, Hall v.	279
— v. Shaw	99	Hulkes v. Day	156
Hodson, Wallis v.	263	Hulme v. Chitty	285

	Page		Page
Humble v. Mitchell ..	153, 168	Jennings, Hurst v. ..	95
—, M'Iver v. ..	228	—, Rawlings v. ..	150
Humpage, Grafftey v. ..	193, 213	Jervois, Radburn v. ..	149
Humphrey v. Arabin ..	135	Jervois v. Silk ..	204
—, Peer v. ..	291	Jessopp v. Watson ..	262
Humphreys, Davies v. ..	99	Johnes, Fores v. ..	78
Hunloke, Henneage v. ..	199	Johnson, Cooper v. ..	141
Hunt v. Bate ..	62	— v. Hill ..	27
— v. De Blaquiére ..	286	—, Hyde v. ..	71
—, Knight v. ..	104	— v. Johnson ..	254
— v. Robins ..	45	—, Rawson v. ..	39
Hunter, Cruise v. ..	286	—, Worrall v. ..	29
—, Marsh v. ..	151	Johnston, Davis v. ..	50
— v. Parker ..	51	Jones v. Bowden ..	294
Hurst v. Jennings ..	95	— v. Bright ..	294
—, Parnham v. ..	101	—, Burke v. ..	298
Husbands, Ex parte ..	237	— v. Davids ..	99
Hutchings v. Smith ..	278	—, Edwards v. ..	32, 215, 237
Hutchinson, Fetherstone v. ..	78	—, Ex parte ..	53, 54
—, Latob v. ..	142	—, Ford v. ..	146
Hyat v. Hare ..	229	—, Hartford v. ..	27
Hyde v. Johnson ..	71	—, Reilly v. ..	60
— v. Price ..	98	—, Scott v. ..	299
		—, Tyler v. ..	141
		—, Waite v. ..	78
		Judson, Nicholls v. ..	250

I.

Idle's case ..	18
Inge v. Moseley ..	77
Ingham, Simson v. ..	103
Ingilby, Winn v. ..	15
Innes, Penny v. ..	74
Irons v. Smallpiece ..	32
Irvine, Rannie v. ..	79
Irving v. Richardson ..	53

J.

Jackson, Butcher v. ..	201
—, Ex parte ..	117
—, Harrison v. ..	230
— v. Jackson ..	200
— v. Nichol ..	41
— Purdew, v. ..	279
— v. Thompson ..	128
—, Thorpe v. ..	226
—, Wheelwright v. ..	120
James v. Durrant ..	213
— v. Thomas ..	94
Jamieson, in re ..	146
Janson, Ex parte ..	226, 227
Jarvis, Smith v. ..	229
Jeffereys v. Small ..	220
Jeffery v. Jeffery ..	64
Jenkins, Perry v. ..	298
Jenkyns v. Osborne ..	40
Jennings v. Brown ..	65

K.

Kain, Shepperd v. ..	293
Kearsley v. Cole ..	225
—, Morris v. ..	220
Keating, Hanson v. ..	276
Keeley, Winch v. ..	101
Keith, Rees v. ..	273
Kelly, Hughes v. ..	296
Kemble v. Farren ..	61
—, Wymer v. ..	89
Kempe v. Andrews ..	220
Kennedy, Molony v. ..	281
Kensington v. Chandler ..	214
— v. Dollond ..	282
—, Ex parte ..	226
Kenyon, Eastwood v. ..	62, 65
Ker v. Lord Dungannon ..	188
Kerrison v. Cole ..	77
Kerswill v. Bishop ..	54
Kettlewell, Meek v. ..	64
Key, Heath v. ..	100
Kimpton, Betts v. ..	276
King, Gaskell v. ..	77
Kinnersley v. Mussen ..	86
Kirkland, Hanbury v. ..	211
Kirkman, Needham v. ..	213
Kirkpatrick v. Tattersall ..	65
Kirwan v. Daniel ..	216
—, Hamilton v. ..	200

	Page		Page
Knatchbull v. Fearnhead ..	246	Lee v. Young	207
Knight v. Barber ..	153, 168	Leeder, Biddell v.	78
— v. Hunt	104	Legg v. Evans	23, 29, 45
— v. Knight	283	Leicester, Furniss v.	293
Kregan v. Smith	286	— v. Rose	104
Kruges v. Wilcox	29	Leighton v. Wales	60, 79
Kymer, Halford v.	135	Lempriere, De la Garde v. ..	277
Kynaston, Clayton v. . .	223, 225	Leonard v. Baker	129
—, Lacey v.	225	Lescher, Bain v.	254
Kyne v. Moore	77	Leslie v. Guthrie	54
Kynnersley, Marquis of Ormond v.	146	Le Vasseur v. Scratton ..	271, 273
L.		Lewen v. Dodd	222
Lacey v. Kynaston	225	Lewis Bowles's case	17
—, Thompson v.	26	— v. Madocks	213
Lack, Thompson v.	100, 225	— v. Marling	173
Lackington v. Atherton ..	39	—, Reynell v.	232
Laing v. Fidgeon	294	Lickbarrow v. Mason	40
Lake v. Craddock	220	Liford's case	17
—, Tyler v.	232	Lingard, Ex parte	146
Lambert's case	229	Lingen v. Sowray	203
— Clough v.	285	Linnit v. Chatters	89
— v. Hutchinson	142	Lisle, Agar v.	82
Lampert's case	187	Littlefield v. Shee	65
Lampleigh v. Brathwait ..	62	Livesay v. Redfern	249
Lane v. Burghart	68, 122	Lloyd v. Ashby	229
—, Durnford v.	271	— v. Baldwin	209
— v. Gaze	255	—, Harris v.	123, 252
Lashbrook v. Cock	222	—, Powell v.	105
Lassells v. Cornwallis	195	— v. Tench	263
Latham, Oliver v.	141	Lockhart, Lee v.	104
Lauderdale, Lord, Garrard v. ..	215	Loftus, Ricketts v.	198
Law v. Bagwell	215	Logan, Hopkins v.	63
Lawrence, Hall v.	146	Lomas v. Wright	95
— v. Smith	78	London Dock Company, Calvert v.	100
—, Sollers v.	59	Londonderry, Graham v. ..	273, 274
Laws, Blacklow v.	282	Longstaff v. Meagoe	14
Lawton v. Lawton	14	Loveacres d. Mudge v. Blight ..	222
Laythorpe v. Bryant	69	Loveday, Leake v.	23
Lea, Barker v.	277	Lovell v. Hicks	230
Leake v. Loveday	23	Loveridge v. Cooper	300, 302
—, Monys v.	80	Lowe, Banner v.	191
Lechmere v. Earl of Carlisle ..	208	Lowndes v. Collins	98
— v. Fletcher	71	— v. Lowndes	145
Lecone v. Sheires	285	Loy, Hodgson v.	40
Ledsam, Russell v.	172	Loyd, Cullingworth v.	104
Lee, Brown v.	99	Lucas v. Dorrien	34
—, Du Vigier v.	296	— v. Wilson	145
—, Hopkinson v.	219	Lunn, Bank of England v. ..	155, 157
— v. Lockhart	104	— v. Thornton	31
—, Morris v.	75	Lyde v. Barnard	72, 301
— v. Muggeridge	65	Lygon v. Lord Coventry ..	205
— v. Pain	254	Lynch v. Dalzell	135
— v. Prieaux	232	Lyne, — v.	232
—, Waring v.	199	Lyon, Perrin v.	269
		Lyons v. De Pass	291
		Lysons v. Barrow	242

M.		Page		Page
Maberly v. Turton ..	..	204	Meacher v. Younge ..	204
Macarthur v. Campbell ..	..	145	Meagoe, Longstaff v. ..	14
Macdougall, Harnett v. ..	..	284	Medina v. Stoughton ..	293
—— v. Robertson ..	..	141	Medlicot's case ..	112
Mackintosh v. Trotter ..	..	14	Meek v. Kettlewell ..	64
——, Wellington v. ..	..	137	Mentney v. Petty ..	263
Macklew, Agar v. ..	..	153	Meredith v. Farr ..	253
Maddison, Benyon v. ..	..	192	Merriman, Elliot v. ..	245
Madeley, Gaters v. ..	..	276	Meryon v. Collett ..	193
Madocks, Lewis v. ..	..	213	Mestayer v. Gillespie ..	50
Maguire, Caulfield v. ..	..	99	Metcalf, Wise v. ..	59
Malcomb v. Charlesworth ..	..	278	Methin, Morris v. ..	85
Malkin v. Adams ..	..	108	Meux v. Bell ..	301
——, Attorney-General v. ..	..	193	Mexborough v. Bower ..	138
Mallan v. May ..	..	77, 79	Meyer, Hanson v. ..	36
M'Alpine v. Mangnall ..	..	176	—— v. Haworth ..	65
Maltby v. Carstairs ..	..	100	M'Ghie, Dean v. ..	54
Man v. Shiffner ..	..	28	Michell v. Michell ..	190
Mann, Burnet v. ..	..	262	Middleton, Copis v. ..	98
Mangles, Naylor v. ..	..	23	Miles v. Presland ..	155
Mangnall, M'Alpine v. ..	..	176	Miller v. Miller ..	32, 237
Manning's case ..	..	187	—— v. Race ..	290
Manser v. Heaver ..	..	143	—— v. Taylor ..	178
March v. Attorney-General ..	..	252	Mills v. Barber ..	72
—— v. Russell ..	..	246	Milner v. Lord Harewood ..	271
Market overt, the case of ..	..	291	Minnit v. Whinery ..	230
Markham, Bunn v. ..	..	237	Mitchel v. Ede ..	34
Marling, Lewis v. ..	..	173	Mitchell, Brooke v. ..	23, 141, 142
Marris, Bower v. ..	..	103, 121	——, Doe d. Esdaile v. ..	118
Marsh, Archer v. ..	..	79	——, Humble v. ..	153, 168
—— v. Hunter ..	..	151	M'Iver v. Humble ..	228
——, Stone v. ..	..	230, 293	M'Ivers, Howell v. ..	101
Marshall, Gardner v. ..	..	277	Mizen v. Pick ..	286
Martin, Colliers v. ..	..	75	M'Laine, Hoadley v. ..	37
—— v. Crompe ..	..	220	M'Leod v. Drummond ..	245
——, Morris v. ..	..	287	M'Michael, Boydell v. ..	15
——, Reynish v. ..	..	270	Moffatt, Bank of England v. ..	157
—— v. Sedgwick ..	..	231, 302	Mollard, Bagley v. ..	252
Martindale, Anderson v. ..	..	219	Molony v. Kennedy ..	281
—— v. Booth ..	..	44	Monkman v. Shepherdson ..	65
—— v. Smith ..	..	56	Montague v. Benedict ..	280
——, Taylor v. ..	..	149	Monys v. Leake ..	80
Mason, Davis v. ..	..	79	Moor v. Barham ..	263
——, Lickbarrow v. ..	..	40	——, Stokes v. ..	69
—— v. Morgan ..	..	275	——, Williams v. ..	66
—— v. Wallis ..	..	142	Moore v. Frowd ..	210
Mathias, Gray v. ..	..	77	——, Kyne v. ..	77
Matthews v. Brise ..	..	205	—— v. Moore ..	284
——, Houghton v. ..	..	28	Morell v. Dubost ..	85
Maude, Benson v. ..	..	246	Morgan, Mason v. ..	275
Maunder, Wright v. ..	..	128	Morley v. Bird ..	218, 254
May v. Chapman ..	..	75	—— v. Boothby ..	67
——, Mallan v. ..	..	77, 79	——, Child v. ..	152
——, Protheroe v. ..	..	176	—— v. Rennoldson ..	269, 270
Mayor, Squire v. ..	..	15	Morrell v. Morrell ..	236
Maze, Aubert v. ..	..	76	Morris, Colston v. ..	285
M'Callan v. Mortimer ..	..	153	—— v. Howes ..	193
			—— v. Kearsley ..	220

	Page
Morris v. Lee	75
— v. Martin	287
— v. Methin	85
Morrison, Dutton v.	105
Mortimer, M'Callan v.	153
Morton, Honner v.	279
Moseley, Inge v.	77
Moss, Burrough v.	275
Mouls, Shepherd v.	151
M'Queen v. Farquhar	200
Muggeridge, Lee v.	65
Mullen v. Bowman	255
Munnings, Attwood v.	293
Munro, Ex parte	301
Murray v. East India Company	293
— v. Lord Elbank	277
Mussen, Kinnersley v.	86

N.

Napier v. Napier	277
Nash, Springens v.	145, 146
Naylor v. Mangles	28
Neate, Franklin v.	25
Needham v. Kirkman	213
— v. Smith	213
—, Webb v.	258
Neilson v. Harford	175
Nesham, Barry v.	229
Netherseal, Rex v.	241
Newbon, Wakefield v.	29
Newbury v. Armstrong	68
Newman, Page v.	98
Newnham, Parbery v.	140, 142
Nichol, Jackson v.	41
Nicholls v. Judson	250
Nichols v. Norris	104
— v. Roe	144, 145
Nicholson v. Chapman	27
—, Potter v.	87
— v. Revill	100, 225
Niekels v. Haslam	175
Nieolls v. Bastard	25
—, Smith v.	90
Nimmo, Ellis v.	64
Nix, Bryans v.	34
Noble, Devaynes v.	103, 226
—, Vulliamy v.	228
Norbury v. Norbury	151
Norcott v. Gordon	250
Norman, Fergusson v.	77
Norris, Nichols v.	104
North, Goodtitle v.	122
Northey v. Field	41
— v. Northey	274
Norman v. Baldry	246
— v. Phillips	37

	Page
Norton v. Frecker	298
Nourse, Richardson v.	144
Nugent v. Gifford	245
Names v. Scipio	153

O.

Oekenden, Ex parte	27
Ogilvie v. Foljambe	69
Oldham v. Hughes	208
Oliver v. Latham	141
Onslow v. Onslow	264
Onwhyn, Stockdale v.	78
Ormond, Marquis of, v. Kyanners- ley	146
Osborn, Salmon v.	146
—, Silk v.	122
Owen v. Thomas	70

P.

Packman, Sloane v.	80
Page v. Newman	98
— v. Page	254
—, Powles v.	231, 302
Paget v. Foley	296
Pain, Lee v.	254
—, Ridout v.	144
— v. Whitaker	26
Palles, Simmonds v.	216
Palmer, Fraser v.	210
—, Hall v.	77
—, Hay v.	191
— v. Wakefield	280
— v. Wheeler	200
Parbery v. Newnham	140, 142
Paris v. Paris	190
Parish, Drummond v.	235
Parker, Baldey v.	37
—, Clarke v.	270
—, Hoare v.	138
—, Hunter v.	51
—, Sparling v.	252
—, Stanes v.	210
Parker, Watson v.	95
Parkin v. Carruthers	228
Parnham v. Hurst	101
Parrot, Etherington v.	287
Parry, Barrett v.	142
Parsons, Bank of England v.	157
Partington, Andrews v.	204
Partridge, Weldale v.	208
Pass, Poole v.	211
Pateh, Channon v.	17
Pawle v. Gunn	62, 153
Pawlett, Ex parte	206

	Page		Page
Paxton, Cholmeley <i>v.</i>	17	Pinchon's case	92
——— <i>v.</i> Popham	76	Pinke, Hinton <i>v.</i>	248
Payne <i>v.</i> Deakle	142	Pinkney <i>v.</i> Hall	229
Paynter, Adams <i>v.</i>	210	Platt <i>v.</i> Routh	244
———, Harrison <i>v.</i>	102	Plummer, Ex parte	120
Peacock, Berriman <i>v.</i>	17	———, in re	227
——— <i>v.</i> Rhodes	73, 290	Plymouth, Earl of, Ridout <i>v.</i> ..	274
Peake, Ex parte	226	Pocock, Browne <i>v.</i>	283
Pearly <i>v.</i> Smith	191	———, Roberts <i>v.</i>	249
Pearson, Foster <i>v.</i>	290	Pole <i>v.</i> Harrobin	76
Peck, Dawes <i>v.</i>	38, 41	Poole, Crofton <i>v.</i>	123
Pedley <i>v.</i> Goddard	145	——— <i>v.</i> Pass	211
Peel <i>v.</i> Tatlock	100	Popham, Paxton <i>v.</i>	76
Peet <i>v.</i> Humphrey	291	Poppleton, Everard <i>v.</i>	87
Peering, Ford <i>v.</i>	12	Pott <i>v.</i> Eyton	229
Pemberton, Ex parte	28	Potter, Hall <i>v.</i>	270
Pendlebury <i>v.</i> Walker	99, 104	———, Kirby <i>v.</i>	248
Penny <i>v.</i> Innes	74	——— <i>v.</i> Nicholson	87
Penoyre, Wood <i>v.</i>	246	Powell <i>v.</i> Lloyd	105
Penton, Davies <i>v.</i>	61	——— <i>v.</i> Rees	58
Perkins <i>v.</i> Bradley	43	———, Shafto <i>v.</i>	90
———, Groves <i>v.</i>	277	Power <i>v.</i> Barham	293
———, Walker <i>v.</i>	77	Powles <i>v.</i> Page	231, 302
Perrin <i>v.</i> Lyon	269	Pownall, Holst <i>v.</i>	41
Perry <i>v.</i> Jenkins	298	Presland, Miles <i>v.</i>	155
——— <i>v.</i> Skinner	175	Prescot, Snee <i>v.</i>	40
Petch <i>v.</i> Tutin	31	Prescott <i>v.</i> Boucher	276
Peter <i>v.</i> Compton	68	Prestwood, Durant <i>v.</i>	263
——— <i>v.</i> Rich	99	Price <i>v.</i> Green	60, 77, 79
Peterborough, Bishop of, Boyle <i>v.</i> ..	198	———, Harrington <i>v.</i>	10
Petre <i>v.</i> Espinasse	215	———, Hyde <i>v.</i>	98
Petrie <i>v.</i> Bury	217	——— <i>v.</i> Richardson	68
Petty <i>v.</i> Anderson	280	Pride <i>v.</i> Fooks	151, 211
———, Mentney <i>v.</i>	263	Prieaux, Lee <i>v.</i>	282
——— <i>v.</i> Styward	221	Pring <i>v.</i> Pring	255
Philanthropic Society <i>v.</i> Kemp ..	252	Prior <i>v.</i> Hembrow	141
Philips <i>v.</i> Robinson	10	Pritchard, Shaw <i>v.</i>	80
Phillips, Norman <i>v.</i>	37	Proctor <i>v.</i> Sergeant	79
——— <i>v.</i> Phillips	220, 222	Protheroe <i>v.</i> May	176
———, Swan <i>v.</i>	72, 301	Proudley <i>v.</i> Fielder	281
Philpot <i>v.</i> Briant	100	Pugh <i>v.</i> Taylor	281
Philpott, Ex parte	105	Pullen <i>v.</i> Purbecke	47
Phipps, Holford <i>v.</i>	211	Purbecke, Pullen <i>v.</i>	47
Pick, Mizen <i>v.</i>	286	Purdew <i>v.</i> Jackson	279
Pickering <i>v.</i> Appleby	153	Pye, Ridout <i>v.</i>	143
——— <i>v.</i> Busk	292	Pym, Sweet <i>v.</i>	29
——— <i>v.</i> Dowson	294		
Pickford, Aspinall <i>v.</i>	28		
Picton, Shaw <i>v.</i>	103		
Pidgeley <i>v.</i> Rawling	17		
Pierce <i>v.</i> Thornely	278		
Piercy <i>v.</i> Roberts	232		
Pierson <i>v.</i> Garnet	199		
Piggott, Clancy <i>v.</i>	67		
———, Wilson <i>v.</i>	197		
Pigot's case	76		
Pimbley, Fisher <i>v.</i>	144		

R

Race, Miller <i>v.</i>	290
Rachfield <i>v.</i> Careless	255
Radburn <i>v.</i> Jervis	149
Ram, Ex parte	300
Ramsbottom, Harcourt <i>v.</i>	143
———, Hooper <i>v.</i>	12
Randall <i>v.</i> Randall	220
Rann <i>v.</i> Hughes	62

	Page		Page
Rannie v. Irvine	79	Right d. Compton v. Compton ..	270
Ravenshaw v. Hollier	215	Ripley v. Waterworth	157
Rawdon v. Wentworth	89	Rishton v. Cobb	269
Rawling, Pidgeley v.	17	Roberts, Cave v.	265
Rawlings v. Jennings	150	———, Piercy v.	232
Rawlinson v. Clarke	229	——— v. Pocock	249
———, Williams v.	103	——— v. Spicer	282
Rawson v. Johnson	39	——— v. Walker	43
Rawsthorn v. Arnold	145	——— v. Wyatt	23
Reay, Cookson v.	208	Robertson, Dimsdale v.	138, 142
——— v. Richardson	103	———, Macdougall v.	141
Redfern, Livesay v.	249	———, Whitmore v.	89, 119
Reed v. Wilmot	14	Robins, Hunt v.	45
Rees v. Keith	278	Robinson, Brandon v.	283
———, Powell v.	58	——— v. Gleadow	51
Reid, Donellan v.	69	———, Philips v.	10
——— v. Fryatt	142	——— v. Reynolds	75
——— v. Hollingshead	229	Roe, Nichols v.	144, 145
——— West v.	302	Rogers, Chaplin v.	33
Reilly v. Jones	60	Rolle, Ryall v.	45
Relph, Bird v.	59	Rose, Leicester v.	104
Rennoldson, Morley v.	269, 270	Rosier, Shackell v.	63
Revill, Nicholson v.	100, 225	Ross, Ex parte	117
Rex v. Bardell	142	Rossiter, Hooper v.	190
——— v. Collector of Customs ..	220	Rouch v. Great Western Railway Company	118
——— v. Greenhill	286	Roundell v. Breary	213
——— v. Hill	142	Round, Addison v.	22
——— v. Netherseal	241	Routh, Platt v.	244
——— v. Sankey	29	Routledge v. Dorril	199, 201
——— v. Sherrington	285	——— v. Grant	70
——— v. Wheeler	175	Rowlands, Cope v.	77
Reynell v. Lewis	232	Rowlandson, Ex parte	229
Reynish v. Martin	270	Rowles, Ryall v.	33, 45
Reynolds, Robinson v.	75	Ruddell v. Dobree	237
Rhodes, Howard v.	210	Rushforth v. Hadfield	28
———, Miller v.	290	Russell, Douglas v.	54
———, Peacock v.	73, 290	——— v. Ledsam	172
——— v. Smethurst	298	———, March v.	246
Rice v. Shute	225	——— v. Smith	180
Rich, Peter v.	99	Rust v. Cooper	120
Richards v. Heather	223	Rutland, Duke of, v. Duchess of Rutland	263
——— v. Richards	276	Ryall v. Rolle	45
———, Wilding v.	216	——— v. Rowles	33, 45
Richardson v. Bank of England	162		
——— v. Brown	293		
———, Ex parte	228		
——— v. Greese	250		
——— v. Horton	223		
———, Irving v.	53		
——— v. Nourse	144		
———, Price v.	68		
———, Reay v.	103		
———, Warwick v.	223		
Ricketts v. Loftus	198		
Rickman v. Morgan	251		
Ridouit v. Earl of Plymouth ..	274		
——— v. Pain	144		
——— v. Pye	143		
		S.	
		Saddlers' Company v. Badcock	135
		Salkeld, in re	146
		Salmon v. Osborn	146
		Salt, Stead v.	230
		Samon's case	143
		Samuda, Zwinger v.	34
		Samuel v. Duke	291
		——— v. Howarth	100
		Sanders, Bloxham v.	39, 41

	Page		Page
Sanderson v. Bell	27	Shuttleworth v. Greaves ..	248
Sandwich, case of Lord ..	200	———, Wigg v.	77
Sandys, Warburton v. ..	210	Sibree v. Tripp	103
Sanger, Cuten v.	214	Siddel, Vallance v.	81
Sankey, Rex v.	29	Silk, Jervoise v.	204
Sargent, Higgins v.	98	—— v. Osborn	122
Saunders, De Mautort v. ..	226	Simmonds v. Palles	216
———, Tollit v.	146	Simmons, Farebrother v. ..	39
——— v. Wakefield	67	——— v. Gutteridge	240
Savill v. Barchard	28	Simond v. Hibbert	28
Sawyer, Whittem v.	277	Simpson, Cowell v.	28, 29
Scarborough v. Borman ..	282, 283	——— Thompson v.	200
Scarpellini v. Atcheson ..	276	Sims v. Thomas	214, 296
Schwabe, Clift v.	134	Simson v. Ingham	103
Scipio, Nunes v.	153	Skerratt, Ex parte	214
Scott, Champernown v. ..	29	Skey v. Barnes	203
——, Driver v.	211	—— v. Carter	89
——, Drury v.	213	Skillern, Amies v.	218
—— v. Jones	299	Skinner, Braithwaite v. ..	6
—— v. Van Sandau	140, 143	—— Perry v.	175
Scrutton, Le Vasseur v. ..	271, 273	—— v. Upshaw	26
Scrivens, Watts v.	153	Skip, West v.	33
Scaton v. Benedict	280	Slater v. Willis	50
Sedgwick, Martin v.	231, 302	Slatter v. Slatter	285
Selby v. Selby	69	Sleech v. Thorington	248
Sergeant, Proctor v.	79	Slingsby's case	217, 219
Seton, Clarke v.	94	Sloane v. Packman	80
Shackell v. Rosier	63	Smailes v. Wright	145
Shafto v. Powell	90	Small, Churchill v.	12
Shalmer, Spalding v.	209	——, Jeffereys v.	220
Shaw v. Evans	85	Smallpiece, Irons v.	32
——, Hodgson v.	99	Smarte v. Edson	224
—— v. Pieton	103	Smethurst, Rhodes v.	298
—— v. Pritchard	80	Smith, Antrobus v.	32
Shee, Clarke v.	290	—— v. Bond	94
——, Littlefield v.	65	—— v. Bunning	270
Sheires, Leone v.	285	——, Carpenter v.	173
Shelley, Gill v.	253	—— v. Chichester	29
Shepherd, Cooper v.	42	—— v. Clark	73
——— v. Moulds	151	——, Fox v.	144
——— Zachary v.	145	——, Helme v.	54
Shepherdson, Monkman v. ..	65	——, Hutchings v.	278
Shepley v. Davis	36	—— v. Jarvis	229
Sheppard v. Duke	295	——, Kregan v.	286
Shepperd v. Kain	293	——, Lawrence v.	78
Sherrard v. Sherrard	191	——, Martindale v.	36
Sherrington, Rex v.	285	——, Needham v.	213
——— v. Yates	275	—— v. Nicholls	90
Sherwood, in re	210	——, Pearly v.	191
Shewen v. Vanderhorst ..	298	——, Russell v.	180
Shiffner, Man v.	23	—— v. Smith	301
Shipbrook, Lord, v. Lord Hin-		——, Vernon v.	135
chbrook	211	——, Young v.	165
Shipman, Bush v.	104	Smyth, Battersby v.	50
Shore, Lady, v. Billingsley ..	213	——, Houlston v.	287
Shortland, Ex parte	214	——, Willson v.	286
Shortredge v. Cheek	68	Snee v. Prescott	40
Shute, Rice v.	225	Snellgrove v. Baily	237

Snow, Goddard v.	281
—, Wilbraham v.	23
Soane, Conduitt v.	188
Sollers v. Lawrence	59
Somerville, Hotham v. . . .	12
Sothern, Swanwick v. . . .	36
Souch v. Strawbridge	68
South Carolina Bank v. Case	230
Sowray, Lingen v.	208
Sowry, Briggs v.	122
Spalding, Alsager v.	104
— v. Shalmer	209
Sparling v. Parker	252
Spencer, Hill v.	77
Spettigue, White v.	291
Spicer, Roberts v.	282
Spiers, Thompson v.	301, 302
Sprigens v. Nash	145, 146
Squire v. Huctson	89
—, Mayor v.	15
Stafford, Earl of, v. Buckley .	149
Stamford, Heard v.	280
Stamper v. Barker	285
Stanes v. Parker	210
Stanley, Crossfield v.	89
Stannard, Angier v.	211
Stanton v. Hall	278
Statham, Adams v.	144
Stead, Barker v.	232
— v. Salt	230
Steadman v. Hockley	29
Steele, Swan v.	229
Steinmiz v. Halthin	277
Stephens, Edgeberry v. . . .	174
—, Hart v.	276
— v. Olive	285
Sterling, Ex parte	28
Stevenson v. Blakelock	28
St. John, Lord, v. Boughton . .	295
— v. Lady St. John	285
Stockdale v. Onwhyn	78
Stocken v. Stocken	204
Stokes, Brice v.	211
— v. Holden	43
— v. Moor	69
—, Todd v.	287
Stone, Collins v.	88
— v. Marsh	230, 292
Stones v. Cooke	286
Stoughton, Medina v.	293
Stoveld v. Hughes	33
Strafford, Lord, Byng v. . . .	192
Strathmore, Countess of, v. Bowes	280
Stratton v. Grymes	270
Strawbridge, Souch v.	68
Streatfield v. Halliday	224
Strode v. Blackburne	12

	Page
Strutt, Deeks <i>v.</i>	6
Stubbs, Hughes <i>v.</i>	215
Studdy, Churchward <i>v.</i>	20
Sturgis <i>v.</i> Champneys	276
Styward, Petty <i>v.</i>	221
Sunbolf <i>v.</i> Alford	27
Sutton, Ex parte	112
——— <i>v.</i> Buck	25
———, Fitch <i>v.</i>	102
Swan <i>v.</i> Steele	229
Swann <i>v.</i> Phillips	72, 301
Swans, the case of	18
Swanwick <i>v.</i> Sothern	36
Sweet <i>v.</i> Pym	29
Swinburne, Craythorne <i>v.</i>	99
Winnerton, Heming <i>v.</i>	140
Swinton, Willoughby <i>v.</i>	95
Symonds, Thompson <i>v.</i>	182
———, Williams <i>v.</i>	302
Syms, Balch <i>v.</i>	29
Synge, Howe <i>v.</i>	77

T.

Tapfield <i>v.</i> Hillman	31
Tappenden <i>v.</i> Burgess	105
Tate <i>v.</i> Hilbert	237
Tatlock, Peel <i>v.</i>	100
Tattersall, Kirkpatrick <i>v.</i>	65
Taylor <i>v.</i> Martindale	149
— <i>v.</i> Miller <i>v.</i>	178
— <i>v.</i> Pugh	281
—, in re	286
—, Wallis <i>v.</i>	193
—, Waters <i>v.</i>	138
Tebbs <i>v.</i> Carpenter.. ..	150
Templeton <i>v.</i> Warrington	203
Tench, Lloyd <i>v.</i>	263
Teynham, Lord, <i>v.</i> Webb	199
Thomas <i>v.</i> Desanges	118
—, James <i>v.</i>	94
—, Owen <i>v.</i>	70
—, Sims <i>v.</i>	214, 296
Thomason <i>v.</i> Frere	221
Thompson, Farrant <i>v.</i>	15
— <i>v.</i> Griffin	204
—, Hill <i>v.</i>	174, 175
—, Jackson <i>v.</i>	128
— <i>v.</i> Lacey	26
— <i>v.</i> Lack	100, 225
— <i>v.</i> Simpson.. ..	200
— <i>v.</i> Spiers	301, 302
— <i>v.</i> Symonds	182
— <i>v.</i> Thompson	122, 252
Thorington, Sleen <i>v.</i>	248
Thorneley, Pierce <i>v.</i>	278
Thornton, Lunn <i>v.</i>	31

	Page
Thorpe, Glynn <i>v.</i>	91
—— <i>v.</i> Jackson	226
——, Williams <i>v.</i>	301
Thurlow, Cunynghame <i>v.</i>	200
Tidswell <i>v.</i> Angerstein	135
Tipping <i>v.</i> Tipping	274
Todd <i>v.</i> Stokes	287
—— <i>v.</i> Wilson	210
Tollit <i>v.</i> Saunders	146
Tolson <i>v.</i> Dykes	132
Tomlin <i>v.</i> Mayor of Fordwich..	143
Tomlinson <i>v.</i> Tomlinson	251
Topham, Ex parte	117
Townroe, Wightman <i>v.</i>	228
Townshend, Lord, <i>v.</i> Windham,	274
Travers <i>v.</i> Travers	213
Tripp, Sibree <i>v.</i>	103
Trollope <i>v.</i> Linton	272
Trotter, Mackintosh <i>v.</i>	14
Trueman <i>v.</i> Fenton	65
Tugman <i>v.</i> Hopkins	281
Tullett <i>v.</i> Armstrong	282, 283
Turnbull, Godfrey <i>v.</i>	228
Turner <i>v.</i> Turner	149, 204
—— <i>v.</i> Vaughan.. ..	77
——, Ward <i>v.</i>	33
——, Wood <i>v.</i>	237
Turton, Maberly <i>v.</i>	204
Tutin, Petch <i>v.</i>	31
Twynam, Coope <i>v.</i>	99
Twyne's case	44, 64
Tyler <i>v.</i> Jones	101
—— <i>v.</i> Lake	282
Tyndall, Attorney-General <i>v.</i> ..	252

U.

Upshaw, Skinner v.	..	..	26
Usborne, Jenkyns v.	..		40

 $V.$

Vallance <i>v.</i> Siddel	81
Valpy, Dickinson <i>v.</i>	..	..	231
Van <i>v.</i> Barnett	..	..	208
Vandeputt, Wiseman <i>v.</i>	..	..	40
Vandergucht <i>v.</i> De Blaquiere	..	..	286
Vanderhorst, Shewen <i>v.</i>	..	..	298
Van Sandau, Scott <i>v.</i>	..	..	140, 143
Vaughan, Grant <i>v.</i>	..	..	290
————, Turner <i>v.</i>	..	..	77
Vawdry, Cartwright <i>v.</i>	..	..	252
Vawser, Brown <i>v.</i>	..	..	147
Vere <i>v.</i> Ashby	..	..	229
Vernon, Davis <i>v.</i>	..	..	10, 12, 28
———— <i>v.</i> Smith	..	..	135

			Page
Viner <i>v.</i> Francis	..	..	254
Vulliamy <i>v.</i> Noble	..	..	228

yy.

Wain v. Warlters	..	..	67
Wainwright, Barclay v.	..	..	190
Wainsford, Warner v.	..	..	259
Waite v. Jones	..	..	78
—, Jones v.	..	..	284
Wakefield v. Brown	..	..	219
— v. Newbon	..	..	29
—, Palmer v.	..	..	280
—, Saunders v.	..	..	67
Wales, Leighton v.	..	60,	79
Walker v. Perkins	..	..	77
—, Roberts v.	..	..	43
—, Woodmeston v.	..	..	288
—, Pendlebury v.	..	99,	104
—, Young v.	..	..	144
Wallace v. Woodgate	..	..	27
Wallis, Binnington v.	..	63,	77
— v. Day	..	..	79
— v. Hodson	..	..	263
—, Mason v.	..	..	142
— v. Taylor	..	..	193
Walsh, Gale v.	..	..	74
— v. Whitcomb	..	..	101
Walter v. Hodge	..	..	237
— Idle's case	..	..	18
Walters, Bevan v.	..	..	27
Walton, Hitchman v.	..	14,	15
Wane, Cumber v.	..	..	102
Warburton v. Sandys	..	..	210
Ward, Bainton v.	..	..	195
— v. Byrne	..	..	78
— v. Combe	..	..	190
— v. Penoyre	..	..	246
— v. Turner	..	..	33
Warde, Bristow v.	..	..	199
—, Dudley v.	..	..	14
Waring v. Lee	..	..	199
Warlters, Wain v.	..	..	67
Warner v. Wainsford	..	..	259
Warrington, Templeton v.	..	..	203
Warwick, Countess of, Edwards v.	191		
— v. Richardson	..	..	223
Waterhouse, Close v.	..	..	28
Waterpark, Young v.	..	..	197
Waters v. Taylor	..	..	138
Waterworth, Ripley v.	..	..	157
Watson, Jessopp v.	..	..	262
— v. Parker	..	..	95
Watt v. Watt	..	..	281
Watts v. Girdlestone	..	151,	211
— v. Scrivens	..	..	153
Waugh v. Carver	..	..	230

	Page		Page
Way v. Bassett	226	Wilkinson v. Henderson	226
Weall v. Rice	251	Wilks v. Davis	138
Weatherby, Brown v.	226	Willet v. Chambers	230
Webb v. Fox	123	Williams v. Burgess	88
— v. Needham	258	—, Ex parte	204
—, Lord Teynham v.	199	— v. Moor	66
Webster v. Webster	228	— v. Rawlinson	103
Weid, Graves v.	16	— v. Symonds	302
Weldon v. Gould	23	— v. Thorpe	301, 302
Welland, Balfour v.	209	Williamson, Chamberlain v.	58
Wellesley v. Duke of Beaufort	286	Willing v. Baine	218
— v. Wellesley	213	Willis v. Black	213
Wellington v. Mackintosh	137	— v. Hiscox	210, 211
Wells, Everett v.	88	—, Slater v.	50
— v. Horton	68	Willomatt, Cooper v.	26
Wennall v. Adney	65	Willoughby, Foljambe v.	205
Wentworth, Rawdon v.	89	— v. Swinton	95
West v. Berney	199	Willson v. Smyth	286
— v. Reid	302	Wilmot, Reed v.	44
— v. Skip	33	Wilmsburst v. Bowker	41
Westmeath, Marq. of, Hindley v.	284	Wilson v. Brownsmith	249
Weston, Foster v.	98	—, Lucas v.	145
Wetherell v. Wilson	205	— v. Piggott	197
Whale v. Booth	245	—, Todd v.	210
Whalley, Carter v.	228	—, Wetherell v.	205
Wheeler, Bushel v.	37	— v. Wilson	210, 285
—, Doe d. Stace v.	239	Wiltshire, Doran v.	209
—, Palmer v.	200	Winch v. Keeley	101
—, Rex v.	175	Winchelsea, Earl of, Deering v.	99
Wheelwright v. Jackson	120	Windham, Lord Townshend v. . .	274
Wheldale v. Partridge	208	Windle v. Andrews	74
Whinery, Minnit v.	230	Winn v. Ingilby	15
Whitaker, Pain v.	26	Wise v. Metcalf	59
Whitchurch, Ex parte	232	Wiseman v. Vandeputt	60
Whitcomb, Walsh v.	101	Wood v. Dixie	46
White, Acton v.	283	—, Green v.	88
—, Blake v.	100	— v. Turner	237
— v. Spettigue	291	— v. Wood	102
Whitfield v. Bewit	17	Woodgate, Acton v.	215
Whitmore, Davenport v.	50	—, Wallace v.	27
— v. Greene	89	Woodmeston v. Walker	283
— v. Robertson	89, 119	Worrall v. Jacob	285
Whittaker v. Howe	79	— v. Johnson	29
Whittem v. Sawyer	277	Wren v. Bradley	284
Whittle v. Henning	279	Wright, Lomas v.	95
Whorwood, Cooke v.	144	— v. Mauuder	128
Wigg v. Shuttleworth	77	—, Smailes v.	145
Wightman v. Townroe	228	Wrightson v. Bywater	143
Wilbraham v. Snow	23	Wyatt, Roberts v.	23
Wilcox, Kruges v.	29	Wymer v. Kemble	89
Wild v. Clarkson	94	Wynne, Hughes v.	94, 298
Wilding v. Richards'	216		
Wildman v. Wildman	150		
Wilkins, Bristead v.	156		
— v. Bromhead	36		
Wilkinson v. Adam	252, 253		
—, Briggs v.	51		
— v. Byers	103		
		Y.	
		Yates, Bridge v.	218
		—, Dixon v.	33, 39, 40
		—, Sherrington v.	275

	Page		Page
Yea <i>v.</i> Field	10	Young <i>v.</i> Waterpark ..	197
Yeoman <i>v.</i> Bradshaw	95	Younge, Meacher <i>v.</i>	204
Yorke, Biffin <i>v.</i>	83		
Young <i>v.</i> Axtell	223		
——, Hasleham <i>v.</i>	230		
——, Lee <i>v.</i>	207		
—— <i>v.</i> Smith	165		
—— <i>v.</i> Walker	144		

Z.

Zachary <i>v.</i> Shepherd ..	145
Zwinger <i>v.</i> Samuda ..	34

ERRATA AND ADDENDA.

Page 27, note (c), for C. M. & R. read Cro. & Mee.

— 98, note (c), for *Higgins v. Sarjent*, read *Higgins v. Sargent*.

— 100, note (c), for *Thompson v. Lock*, read *Thompson v. Lack*.

— 103, note (e), for *Bomer v. Marris*, read *Bower v. Marris*.

— 138, note (d), for *Dimsdale v. Robinson*, read *Dimsdale v. Robertson*.

The case of *Curling v. Flight*, animadverted on at p. 303, is now reported in 6 Hare, p. 41. The author understands that, on appeal to the Lord Chancellor, the right to the production of the title to the mines was given up by the defendant, the purchaser, without argument, and that his Lordship was of opinion that the purchaser was entitled to evidence of the constitution of the company, and of the vendor's title to the shares sold according to such constitution.



PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY.



INTRODUCTORY CHAPTER.

OF THE SUBJECTS AND NATURE OF PERSONAL PROPERTY.

THE English law of property is divided into two great branches,—the law of real property, and the law of personal property. The feudal rules, which respected the holding and culture of land, were the elements of the common law of real property; the rules relating to the disposition of goods were the origin of the law of personal property. Such property was anciently of little importance, and its laws were consequently few and simple. It did not, however, escape the ecclesiastical influence which spread so widely in the middle ages; and it has thence derived that subjection to the rules of the civil law by which it is characterized when transmitted by will or distributed on intestacy.

Real and personal property.

The civil law.

The division of property into real and personal, though now well recognized, and constantly referred to even in the acts of the legislature, is comparatively of modern date. In ancient times, property was divided into *lands, tenements and hereditaments* on the one hand,

Chattels real.

and *goods and chattels* on the other. These two last terms appear to be synonymous. In process of time, however, certain estates and interests in land grew up, which were unknown to the ancient feudal system, and could not conveniently be subjected to its rules. Of these the most important were leases for years. Such interests, therefore, were classed amongst chattels; but as they savoured, as it was said, of the realty, they acquired the name of *chattels real* (*a*). In more modern times, chattels real have been classed, with other chattels, within the division of personal property; but as chattels real, though personal property, are in fact interests in land, the laws respecting them have been noticed in the author's treatise on the Principles of the Law of Real Property (*b*). Chattels real will therefore be only incidentally noticed amongst the subjects treated of in the present work.

Chattels personal.

Reason for the term "personal."

When leases for years, and other interests in land of the like nature, were admitted into the class of chattels as chattels real, it became necessary that such goods as had previously constituted the whole class, should be distinguished from them by some further name; and the title of *chattels personal* was accordingly applied to all such chattels as did not savour of real estate. For this title, the choice of two reasons is given to the reader by Sir Edward Coke, "because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions (*c*)."
The former of these two reasons has been chosen by Mr. Justice Blackstone (*d*). But it is submitted that the latter reason is most probably the true one. When goods and chattels began to be called personal, they had become too numerous and important to accompany the persons

(*a*) Co. Litt. 118b.

(*c*) Co. Litt. 118b.

(*b*) Principles of the Law of Real Property, 315, et seq.

(*d*) 2 Black. Com. 16, 384; 3 Black. Com. 144.

of their owners. On the other hand, the bringing and defending of actions has always been the most prevailing business of lawyers; from the different natures of actions the nomenclature of the law is therefore most likely to have proceeded. Now actions were long divided into three classes,—real actions, personal actions, and mixed actions. Real actions were brought for the recovery of lands, and, by their aid, the *real land* was restored to its rightful owner. Mixed actions, as their name imports, were real and personal mixed together. Personal actions were brought in respect of goods, for which, as they are in their nature destructible, nothing but pecuniary *damages* could with certainty be recovered from the *person* against whom the action was brought. Accordingly, by the law of England, there never have been more than two kinds of personal actions in which there has been a possibility of recovering, by the judgment of the Court, the identical goods in respect of which the action is brought. One of these is the action of *detinue*, where goods, having lawfully come into a man's possession, are unlawfully detained ~~by~~ him; in which case, however, the judgment is merely conditional, that the plaintiff recover the said goods, or (*if they cannot be had*) their respective values, and also the damages for detaining them (*e*). The other is the action of *replevin*, brought for goods which have been unlawfully distrained; but in this case the goods have never been beyond the custody of the sheriff, who is an officer of the law, and their safe return can therefore be secured (*f*). Goods therefore seem to have been called personal, because the remedy for their abstraction was against the *person* who had taken them away, or because, in the words of Lord Coke, they were to be recovered by personal actions (*g*).

Actions real,
personal, and
mixed.

Action of
detinue.

Action of
replevin.

(*e*) 3 Black. Com. 152.

(*f*) 3 Black. Com. 146.

(*g*) See Principles of the Law
of Real Property, 7.

Chattels personal, then, are the subjects of the present treatise. In ancient times they consisted entirely of moveable goods, visible and tangible in their nature, and in the possession either of the owner or of some other person on his behalf. Nothing of an incorporeal nature was anciently comprehended within the class of chattels personal. In this respect the law of personal property strikingly differs from that of real property, in which, from the earliest times, incorporeal hereditaments occupied a conspicuous place. But although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong, or the nonperformance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman French of our early lawyers, a *chose* or thing *in action*, whilst moveable goods were denominated *choses in possession*. Choses in action, though valuable rights, had not in early times the ordinary incident of property, namely, the capability of being transferred; for, to permit a transfer of such a right was, in the simplicity of the times, thought to be too great an encouragement to litigation (*h*); and the attempt to make such a transfer involved the guilt of *maintenance* or the maintaining of another person in his suit. It was impossible, however, that this simple state of things should long continue. Within the class of choses in action was comprised a right of growing importance, namely, that of suing for money due, which right is all that constitutes a *debt*. That a debt should be incapable of transfer was obviously highly inconvenient in commercial transactions; and in early times the custom of merchants rendered debts secured by bills of exchange assignable by indorsement and delivery of the bills.

Chose in action.

Maintenance.

A debt.

But choses in action, not so secured, could only be sued for by the original creditor, or the person who first had the right of action. In process of time, however, an indirect method of assignment was discovered, the assignee being empowered to sue in the name of the assignor; and in the reign of Henry VII. it was determined that “a chose in action may be assigned over for lawful cause as a just debt, but not for maintenance, and that where a man is indebted to me in £20, and another owes him £20 by bond, he may assign this bond and debt to me in satisfaction, and I may justify for suing for it *in the name of the other* at my own costs (*i*).” Choses in action, having now become assignable, became an important kind of personal property; and their importance was increased by an act of the following reign (*k*), whereby the taking of interest for money, which had previously been unlawful, was rendered legal to a limited extent. Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law. In the reign of Queen Anne, promissory notes were rendered, by act of parliament, assignable by indorsement and delivery in the same manner as inland bills of exchange (*l*). But other choses in action continue to this day assignable at law only by empowering the assignee to sue in the name of the assignor.

In addition to the mass of incorporeal personal property, which now exists in the form of choses in action recoverable by action at law, there exist also equitable choses in action, or rights to be enforced by suit in equity; of these a pecuniary legacy is a familiar instance, for which, if the executor withhold payment, the legatee

Equitable
choses in action.

(*i*) Bro. Abr. tit. Chose in Action, pl. 3, 15 Hen. VII. 2.

(*k*) Stat. 37 Hen. VIII. c. 9.

(*l*) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25, s. 3.

can maintain no action at law (*m*), but must either proceed in the Ecclesiastical Court, or bring a suit in equity. This kind of chose in action may be assigned directly from one person to another, and the assignee may sue in equity in his own name. For equity, being of more modern origin than the common law, is guided in its practice by rules more adapted to the exigencies of modern society.

Funds, shares,
&c.

In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment, of which our forefathers were happily ignorant, whilst canal and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the acts of parliament, under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action*. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst *choses in action* will, as we shall hereafter see, help to explain some of their peculiarities.

How personal
property differs
from real.

Such is a general outline of the subjects of modern personal property. They are distinguished from real property by being unaffected by the feudal rules of tenure, by being alienable by methods altogether different, by passing in the first instance to the executors, when bequeathed by will, and by devolving, on their

(*m*) *Deeks v. Strutt*, 5 T. Rep. 690; *Braithwaite v. Skinner*, 5 Mee. & Wels. 313. Legacies under twenty pounds may now be recovered in the county courts,

under the act for the more easy recovery of small debts and demands in England. Stat. 9 & 10 Vict. c. 95, s. 65.

owner's intestacy, not on his heir, but on an administrator appointed by the Ecclesiastical Court, by whom they are distributed amongst the next of kin of the deceased. On the first of these characteristics, however, mainly depends the nature of the property which exists in things personal. The first lesson to be learned on the nature of real property is this—that of such property there can be no such thing as an absolute ownership; the utmost that can be held or enjoyed in real property is an estate (*n*). There may be an estate for life, or an estate tail, or an estate in fee simple; but, according to the law of England, there cannot exist over landed property any absolute and independent dominion. All the land in the kingdom is the subject of tenure; and if the estate is not holden of any subject, at any rate it must be held of the crown. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of absolute ownership, and cannot be held for any estate. It is true that the phrase *personal estate* is frequently used as synonymous with personal property; but this general use of the term *estate* should not mislead the student into the supposition that there can be any such thing as an estate in personalty properly so called. The rule that no estate can subsist in personal property would seem to have originated in the nature of such property in early times. Goods and chattels of a personal kind, in other words, moveable articles, then formed, as we have seen, the whole of a man's personal estate. And such articles, it is evident, may be the subjects of absolute ownership, and have not those enduring qualities which would render them fit to be holden by any kind of feudal tenure. As personal property increased in value and variety, many kinds of property of a more permanent nature became, as we have seen, comprised within the class of personal, such

Real property
held by estates.

Personal pro-
perty the sub-
ject of absolute
ownership.

(*n*) Principles of the Law of Real Property, 16.

as leases for years, of whatever length, and Consolidated Bank Annuities. But the rule that there can be no estate in chattels, the reason of which was properly applicable only to moveable goods, still continues to be applied generally to all sorts of personal property, both corporeal and incorporeal. The consequences of this rule, as we shall hereafter see, are curious and important. But in the first place it will be proper to consider the laws respecting those moveable chattels, or choses in possession, which constitute the most ancient and simple class of personal property; the class however which has given to the rest many of the rules for regulating their disposition.

PART I.

OF CHOSSES IN POSSESSION.



CHAPTER I.

OF CHATTELS WHICH DESCEND TO THE HEIR.

CHOSSES in possession are moveable goods, such as plate, furniture, farming stock, both live and dead, locomotive engines and ships. These, as has been before remarked, are essentially the subjects of absolute ownership, and cannot be held by estates; they are alienable by methods altogether different from those employed for the conveyance of landed property, and they devolve in the first instance on the executor of the will of their owner, or on the administrator of his effects, if he should die intestate. There are, however, some kinds of choses in possession which form exceptions to the general rule: these consist of certain chattels so closely connected with land that they partake of its nature, pass along with it whenever it is disposed of, and descend along with it, when undisposed of, to the heir of the deceased owner. The chattels which thus form exceptions are the subject of the present chapter: they consist principally of *title deeds*, *heir-looms*, *fixtures*, *chattels vegetable*, and *animals feræ naturæ*. Of each in their order.

Exceptions to the general rule.

Title deeds, though moveable articles, are not strictly speaking chattels. They have been called the sinews of the land (*a*), and are so closely connected with it that they will pass, on a conveyance of the land, with-

Title deeds pass by the conveyance of the lands.

(*a*) Co. Litt. 6 a.

out being expressly mentioned: the property in the deeds passes out of the vendor to the purchaser simply by the grant of the land itself (*b*). In like manner a devise of lands by will entitles the devisee to the possession of the deeds; and if a tenant in fee simple should die intestate, the title deeds of his lands will descend along with them to his heir at law (*c*). In former times, when warranty was usually made on the conveyance of lands (*d*), the rule was that the feoffor should retain all deeds containing warranties made to himself or to those through whom he claimed, and also all such deeds as were material for the maintenance of the title to the land (*e*). But if the feoffment was made without any warranty, the feoffee was entitled to the whole of the deeds; for the feoffor could receive no benefit by keeping them, nor sustain any damage by delivering them (*f*). Warranties have now fallen into disuse; but the principle of the rule above stated still applies when the grantor has any other lands to which the deeds relate, or retains any legal interest in the lands conveyed; for in either of these cases he has still a right to retain the deeds (*g*). And if the grantor should retain merely an equitable right to redeem the lands, as in the case of a mortgage in fee simple, it has been held that this equitable right is a sufficient interest in the lands to authorize him to withhold the deeds, unless they are expressly granted to the mortgagee (*h*). It is very questionable, however, whether a legal right ought to

(*b*) *Harrington v. Price*, 3 Barn. & Adol. 170; *Philips v. Robinson*, 4 Bing. 106; S. C. 12 Moore, 308.

(*c*) *Wentworth's Office of an Executor*, 14th ed. 153; *Williams on Executors*, pt. 2, book 2, c. 3, s. 3.

(*d*) See *Principles of the Law of Real Property*, 341.

(*e*) *Buckhurst's case*, 1 Rep. 1 b.

(*f*) 1 Rep. 1 a.

(*g*) Bro. Abr. tit. *Charters de Terre*, pl. 53; *Yea v. Field*, 2 T. Rep. 708; see however *Sugd. Vend. & Pur.* 465; 2 *Prest. Conv.* 466.

(*h*) *Davies v. Vernon*, 6 Q. B. 443, 447.

be attached to an interest merely equitable. And the doctrine last mentioned is opposed by a more recent decision in another court (*i*).

If a conveyance of lands should be made by way of use, thus, if lands should be granted to A. and his heirs, to the use of B. and his heirs, it is said that the title deeds of the land will belong to A., the grantee; because, although the Statute of Uses (*j*) conveys the legal estate in the lands from A. to B., it does not affect the title deeds, which must consequently still remain vested in A. (*k*). But this doctrine has been justly questioned, on the ground that the legislative conveyance from A. to B., effected by the Statute of Uses, ought to be at least as powerful as the common law conveyance of the lands to A.; and if the latter conveyance can carry with it the deeds relating to the land, the former conveyance should be considered as powerful enough to do the same (*l*).

When the conveyance is by way of use.

The tenant of an estate in fee simple in lands possesses the highest interest which the law of England allows to any subject; and such a tenant possesses also an absolute property in the title deeds, which he may destroy at his pleasure, or sell for the value of the parchment (*m*). But if the lands to which deeds relate should be settled on any person for life or in tail, a qualified ownership will arise with respect to the deeds, different in its nature from that simple property which is usually held in chattels personal. As the lands are now held for a limited estate, so a limited interest in the deeds belongs to the tenant. The tenant for life or in tail, when in possession of the lands, being the freeholder

When the lands are settled.

(*i*) *Goode v. Burton*, Exch. 11 5th ed. 117.
Jur. 851.

(*l*) Sugd. Vend. & Pur. 464;

(*j*) 27 Hen. VIII. c. 10.

Co. Litt. 6 a, n. (4).

(*k*) 1 Sand. Uses, 4th ed. 119;

(*m*) Cro. Eliz. 496.

for the time being, is entitled also to the possession of the deeds (*n*); whereas the tenant for a mere term of years, of whatever length, not having the freehold or feudal possession of the lands, has no right to deeds which relate to such freehold (*o*); although deeds relating only to the term belong to such a tenant, and will pass, without any express grant, to the assignee of the term (*p*). The tenant for life or in tail in possession, though entitled to the possession or custody of the deeds which relate to the inheritance, has no right to injure or part with them (*q*): he has an interest in the title deeds correspondent only to his estate in the lands; and if he should part with the deeds, even for a valuable consideration, the remainder-man, on coming into possession of the lands, will nevertheless be entitled to the possession of the deeds, just as if the tenant for life or in tail had kept them in his own custody (*r*).

Heir-looms.

Heir-looms, strictly so called, are now very seldom to be met with. They may be defined to be such personal chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner (*s*). The owner of an heir-loom cannot by his will bequeath the heir-loom, if he leave the land to descend to his heir; for in such a case the force of the custom will prevail over the bequest, which not coming into operation until after the decease of the owner, is too late to supersede the custom (*t*). According to some authorities heir-looms consist only of bulky articles, such as tables and benches,

(*n*) *Ford v. Peering*, 1 Ves. jun. 76; *Strode v. Blackburne*, 3 Ves. 225.

(*o*) *Churchill v. Small*, 8 Ves. 323; *Harper v. Faulder*, 4 Mad. 129, 138; *Hotham v. Somerville*, 5 Beav. 360.

(*p*) *Hooper v. Ramsbottom*, 6 Taunt. 12.

(*q*) Bro. Abr. tit. Charters de Terre, pl. 36.

(*r*) *Davies v. Vernon*, 6 Q. B. 413.

(*s*) See Co. Litt. 18 b.

(*t*) *Ibid.* 185 b.

fixed to the freehold (*u*); but such articles would more properly fall within the class of fixtures of which we shall next speak. The ancient jewels of the crown are heir-looms (*w*). And if a nobleman, knight or esquire be buried in a church, and his coat armour or other ensigns of honor belonging to his degree be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take or deface them (*x*). The boxes in which the title deeds of land are kept are also in the nature of heir-looms, and will belong to the heir or devisee of the lands; for such boxes "have their very creation to be the houses or habitations of deeds (*y*);" and accordingly a chest made for other uses will belong to the executor or administrator of the deceased, although title deeds should happen to be found in it. In popular language the term "heir-loom" is generally applied to plate, pictures or articles of property which have been assigned by deed of settlement or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion house in which the articles may be placed. Of this kind of settlement more will be said hereafter.

Crown jewels.

Coat armour.

Tombstone.

Deed boxes.

Popular use of the term "heir-loom."

Fixtures are such moveable articles or chattels personal as are fixed to the ground or soil, either directly, or indirectly by being attached to a house or other building. The ancient common law, regarding land as of far more consequence than any chattel which could be fixed to it, always considered every thing attached to the land as part of the land itself,—the maxim being *quicquid plantatur solo, solo cedit* (*z*). Hence it fol-

Fixtures.

(*u*) Spelman's Glossary, voce Heir-Loom. See Williams on Executors, pt. 2, bk. 2, ch. 2, s. 3.

(*w*) Co. Litt. 18 b.

(*x*) Co. Litt. 18 b.

(*y*) Wentworth's Office of an Executor, 157, 14th edit.

(*z*) See 4 Rep. 64 a; 1 Lord

lowed that houses themselves, which consist of aggregates of chattels personal (namely, timber and bricks) fixed to the land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present day (*a*). So now, a conveyance of a house or other building will comprise all ordinary fixtures, such as stoves, grates, shelves, locks, &c. without any express mention (*b*), unless an intention to withhold the fixtures can be gathered from the context (*c*). So on the decease of a tenant in fee simple, the devisee of a house, or the heir at law in case of intestacy, will be entitled generally to the fixtures set up in it (*d*). The ancient rule respecting fixtures has been greatly relaxed in favor of tenants for terms of years, who are now permitted to remove articles set up by them for the purposes of trade or of ornament or domestic convenience (*e*); and a relaxation has also been made in favor of the executors of a tenant for life, who appear to be allowed to remove similar fixtures set up by their testator (*f*). But the rule of the common law still retains much of its force as between the devisee or heir of a tenant in fee simple and his executor or administrator. Thus a tenant for years may remove marble chimney pieces set up by him during his tenancy; but if erected by a tenant in fee simple, they will pass with the house to the devisee or heir (*g*). So machinery employed in carrying on iron

Raymond, 738; *Mackintosh v. Trotter*, 3 Mee. & Wels. 184, 186; Williams on Executors, part 2, bk. 2, ch. 3, s. 2.

(*a*) See Principles of the Law of Real Property, 13.

(*b*) *Colegrave v. Dias Santos*, 2 Barn. & Cres. 76; S. C. 3 Dowl. & Ry. 255; *Longstaff v. Mcagoe*, 2 Ad. & Ell. 167; *Hitchman v.*

Walton, 4 Mee. & Wels. 409; Sug. V. & P. 37.

(*c*) *Hare v. Horton*, 5 Barn. & Adol. 715.

(*d*) *Shep. Touch.* 470.

(*e*) *Grymes v. Boweren*, 6 Bing. 437.

(*f*) *Lawton v. Lawton*, 3 Atk. 14.

(*g*) *Dudley v. Warde*, Amb. 113.

works or collieries may be removed by a lessee for years, if erected by him ; but if erected by a tenant in fee simple, such machinery, even though removable without injury to the freehold, will belong to the heir or the devisee of the land (*h*). However it seems that pier glasses, fixed by nails, and not let into panels, and hangings fastened up for ornament, will now belong to the executor or administrator of a tenant in fee simple as part of his personal estate (*i*).

Where fixtures are demised to a tenant along with the house, mill, or other building in which they may happen to be, the property in the fixtures still remains in the landlord, subject to the tenant's right to the possession and use of them during his term (*h*); and if they should be severed from the building by the tenant or any other person, or should be separated by accident, the landlord will acquire an immediate right to the possession of them (*l*). In this respect they are subject to the same rules as timber, which, as we shall see, is equally a part of the inheritance until severed, and when cut becomes the personal property of the owner of the fee. Fixtures, which would descend with the house or building to the heir of the owner of the fee on intestacy, are not in fact his goods and chattels properly so called (*m*).

When fixtures are demised.

Chattels vegetable consist, as their name imports, of moveable articles of a vegetable origin, such as timber, underwood, corn, and fruit. All these articles, so long

Chattels vegetable.

(*h*) *Fisher v. Dixon*, 12 Cl. & Fin. 312.

(*i*) *Cave v. Cave*, 2 Vern. 508; *Squire v. Mayor*, 2 Eq. Ca. Abr. 430, pl. 7; S. C. 2 Freem. 249.

(*k*) *Boydell v. M^cMichael*, 1 Cro. Mee. & Rosc. 177; *Hitch-*

man v. Walton, 4 Mee. & Wels. 409.

(*l*) *Farrant v. Thompson*, 5 Barn. & Ald. 826.

(*m*) *Winn v. Ingilby*, 5 Barn. & Ald. 625.

Emblements.

as they remain unsevered from the land, are for many purposes considered as part of it; and they will pass by a conveyance or devise of the land without express mention (*n*). If, however, the trees should be expressly excepted out of the conveyance, they will remain the personal property of the grantor, although severed only in contemplation of law (*o*); and in like manner the trees alone may be granted by a tenant in fee simple, and will then form the personal property of the grantee, even before they are cut down (*p*). But if a tenant of lands in fee simple should die without having sold or devised them, the law then draws a distinction between such vegetable products as are the annual result of agricultural labour, and such as are not. The former class are called by the name of *emblements*, and the right to reap them belongs to the executor or administrator of the deceased in exclusion of the heir (*q*), whilst the latter class descend to the heir along with the land. The reason of the distinction appears to be, that as annual crops are mainly the result of labour incurred at the expense of the owner's personal estate, his personal estate ought to reap the benefit of the crop which results (*r*). Accordingly crops of corn, and grain of all kinds, flax, hemp, and everything yielding an artificial annual profit produced by labour, belong to the executor or administrator, as against the heir; whilst timber, fruit trees, grass, and clover, which do not repay within the year the labour by which they are produced, belong to the heir as part of the land (*s*). The right to emblements also belongs to the executor or administrator of a

(*n*) Com. Dig. tit. Biens (H.)

(*o*) *Herlakenden's case*, 4 Rep. 63 b.

(*p*) Wentworth's Office of an Executor, 14th ed. 148; Williams on Executors, pt. 2, bk. 2, ch. 2, sec. 2.

(*q*) Com. Dig. tit. Biens (G.)

(*r*) Wentworth's Office of an Executor, 14th ed. 147.

(*s*) See *Graves v. Weld*, 5 Barn. & Adol. 105; S. C. 2 Nev. & Man. 725.

tenant for life (*t*), and to a tenant at will, if dismissed from his tenancy before harvest (*v*).

When lands are let to a tenant for years or for life, if no exception is made of the timber, the property in the timber will still remain in the owner of the inheritance, subject to the tenant's right to have the mast and fruit growing upon it, and the loppings for fuel, and the benefit of the shade for his cattle (*w*). Accordingly all fruit which may be plucked, or bushes or trees, not being timber, which may be cut or blown down, will belong to the tenant (*x*); but timber trees, which may be cut or blown down, will immediately become the property of the owner of the first estate of inheritance in the land, whether in fee simple or in tail (*y*). Timber trees are oak, ash, and elm in all places; and in some particular parts of the country, by local custom, where other trees are generally used for building, they are for that reason considered as timber (*z*). But if the tenant should be a tenant *without impeachment of waste* (*sine impetitione vasti*), timber cut down by him in a husband-like manner will become his own property when actually severed (*a*), but not before (*b*); for the words "without impeachment of waste" imply a release of all demands in respect of any waste which may be committed (*c*). If, however, the words should be merely *without being impleaded for waste*, the property in the

When lands are let for years or life.

Timber trees.

Tenant without impeachment of waste.

(*t*) Principles of the Law of Real Property, 24.

(*v*) *Ibid.* p. 315.

(*w*) *Liford's case*, 11 Rep. 48 b.

(*x*) *Channon v. Patch*, 5 Barn. & Cress. 897; S. C. 8 Dow. & Ry. 651; *Berriman v. Peacock*, 9 Bing. 384; S. C. 2 Moo. & Scott, 524; *Pidgley v. Rawling*, 2 Coll. 275.

(*y*) *Herlukenden's case*, 4 Rep.

63 a; *Whitfield v. Bewit*, 2 P. Wms. 240; 3 P. Wms. 268.

(*z*) 2 Black. Com. 281.

(*a*) *Lewis Bowles' case*, 11 Rep. 82 b. See Principles of the Law of Real Property, 23.

(*b*) *Cholmeley v. Paxton*, 3 Bing. 207; 10 Barn. & Cress. 564.

(*c*) 11 Rep. 82 b.

trees when cut would still remain in the landlord, and the action only would be discharged, which he might otherwise have maintained against the tenant for the waste committed by the act of felling the timber (*d*).

Animals *feræ naturæ*.

Animals *feræ naturæ*, or wild animals, including game, are exceptions from the rules which relate to other moveables, on the ground that until they are caught there is no property in them. If therefore the owner of land in fee simple should die, the game on his land, or the fish in any river or pond upon the land, will not belong to his executor or administrator (*e*). And if a man should have a park or warren, he has no true property in the deer, *cowies*, pheasants, or partridges; but they belong to him only "*ratione privilegii* for his game and pleasure so long as they remain in the privileged place (*f*)."¹ But a property in wild animals may be obtained by reclaiming or catching them (*propter industriam*), or by reason of their being unable to get away (*propter impotentiam*) (*g*). Thus rabbits in a hutch, fish in a box, and young pigeons in a dove house, unable to fly, will belong to the executor or administrator of the owner, and not to his heir. It appears to have been formerly thought that hawks and hounds were not subjects of personal property, but would descend with the lands to the heir; but this opinion is not now law. "For," observes the author of the Office of an Executor (*h*), "although they be for the most part but things of pleasure, *that* hindereth not but they may be valuable as well as instruments of music, both tend-

Hawks and hounds.

(*d*) *Walter Idle's case*, 11 Rep. 83 a.

(*e*) Co. Litt. 8 a; *The case of Swans*, 7 Rep. 17 b.

(*f*) 7 Rep. 17 b; Year Book, 4 Hen. VI. 55 b, 56 a; F. N. B. 87, n. (*a*).

(*g*) 2 Black. Com. 391, 394; Williams on Executors, pt. 2, bk. 2, ch. 2, sec. 1.

(*h*) Wentworth's Office of an Executor, 143, 11th ed. The author of this work is supposed to have been Mr. Justice Doddridge.

ing to delight and exhilarate the spirits; a cry of hounds hath to my sense more spirit and vivacity than any other music." *of a noble man's son*

Then you no back say

The occupier of land for the time being has now the sole right of killing and taking the game upon the land, unless such right be reserved to the landlord, or any other person, or unless such occupier holds under a lease or agreement made previously to the passing of the last Game Act (*i*) for a term not exceeding twenty-one years, upon which no fine shall have been taken, and in which the right of killing game shall not have been expressly allowed him (*k*). Where the landlord has reserved to himself the right of killing game, he may authorize any person or persons, who shall have obtained certificates, to enter upon the land for the purpose of pursuing and killing game thereon (*l*). And the lord of any manor or reputed manor has the right to pursue and kill the game upon the wastes or commons within the manor, and to authorize any other person or persons, who shall have obtained certificates, to enter upon such wastes or commons for the same purpose (*m*). Right to kill and take game.

When game or other wild animals were killed on any land by any other person than the rightful owner, the law, with respect to the property in the game, was formerly as follows: If a man started any game within his own grounds and followed it into another's, and killed it there, the property remained in himself. And so if a stranger started game in one man's chase or free warren, and hunted it into another liberty, the property continued in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man started game on another's private grounds, and killed it there, the Property in game.

(*i*) Stat. 1 & 2 Will. IV. c. 32.

(*l*) Sect. 11.

(*k*) Sect. 7.

(*m*) Sect. 10.

property belonged to him in whose ground it was killed. Whereas, if after being started there, it was killed in the grounds of a third person, the property belonged not to the owner of the first ground, because the property was local; nor yet to the owner of the second, because it was not started in his soil; but it vested in the person who started and killed it, though guilty of a trespass against both the owners (*n*). And this appears to be still the law with respect to wild animals which are not game. But with respect to game, an alteration appears to have been made by the last Game Act (*o*), which seems to vest the property in game killed on any land by strangers, in the person having the right to kill and take the game upon the land (*p*).

(*n*) 2 Bl. Com. 419; *Churchward v. Studdy*, 14 East, 249.

(*o*) Stat. 1 & 2 Will. IV. c. 32.
(*p*) Sect. 36.

CHAPTER II.

OF TROVER, BAILMENT AND LIEN.

HAVING now considered those moveable articles of property which form exceptions to the rules by which chattels personal are in general governed, let us proceed to notice some circumstances in which chattels personal may be placed, so as to form not real, but apparent exceptions to the primary rule already noticed (*a*), that personal property is essentially the subject of absolute ownership, and cannot be held for any *estate*. The property in goods can only belong to, or be vested in, one person at one time: in this respect it resembles the seisin or feudal possession of lands (*b*). Lands however may be so conveyed that several persons may possess in them, at the same time, several distinct vested *estates* of freehold, one of them being in possession, and the others in remainder, or the last perhaps being in reversion (*c*). But the law knows no such thing as a remainder or reversion of a chattel. It recognizes only the simple *property* in goods, coupled or not with the right of immediate possession. This single principle of law, if carefully borne in mind, will serve to explain many points which would otherwise appear difficult or even contradictory. It must be remembered, however, that it does not strictly apply to the moveable articles noticed in our first chapter, which, from their connexion with the land, are often governed by the principles of real, rather than those of personal property.

(*a*) *Ante*, p. 7.(*c*) *Ibid.* p. 189.(*b*) See Principles of the Law of Real Property, 107.

1. When the property in goods is coupled with the possession of them, the ownership is of course complete. This is the common and usual case of the ownership of chattels personal: the owner knows that the goods are his own, and in his own possession, and that is sufficient for him. Circumstances may, however, arise to change this state of things. An article may be lost. In this case the owner still retains his property in the thing, but he has lost the possession of it. The property however which still remains in him, entitles him to the possession of the article, whenever he can meet with it; or, in legal phraseology, the property draws with it the right of possession (*d*). If therefore another person should find the article lost, he will have no right to convert it to his own use, but must on demand deliver it up to the rightful owner, in whom the property is already vested. If he should refuse to do so, such refusal will argue that he claims it as his own, and will accordingly be evidence of a conversion of the thing to his own use (*e*). For the wrong or *trespass* thus committed, a specific remedy has been provided by the law, in the shape of an action of *trover and conversion*, or more shortly an action of *trover*, which is one of those actions comprised within the technical class of *trespass on the case*. The word *trover* is from the French *trouver*, to find; and the word *conversion* is added, from the conversion of the goods to the use of the defendant being the gist of the action thus brought against him. That the defendant should have found the article lost is not his fault, but his conversion of it to his own use is a trespass, and renders him liable to the action we are now considering. This action accordingly is now constantly brought to recover damages for withholding the possession of goods, whenever they have been wrongfully converted by the defendant to his own use, with-

When an article is lost.

Action of trover and conversion.

(*d*) 2 Wms. Saunders, 47 a. Hob. 187; Bac. Ab. tit. Trover,
(*e*) *Ibid.* 47 c; *Agar v. Lisle*, (B).

out regard to the means, whether by finding or otherwise, by which the defendant may have become possessed (*f*). This action can be maintained only when the plaintiff has been in possession of the goods (*g*), or has such a property in them as draws to it the right to the possession. If the goods have been wrongfully converted by the defendant to his own use, the plaintiff will succeed, if he should prove either way his own right to the immediate possession of the goods (*h*); if he should not prove such right, he will fail (*i*). The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of trover is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also sometimes called itself a special kind of property; but these expressions should not mislead the student. The action of trover tries only the right to the immediate possession, which, as we shall now see, may exist apart from the *property* in the goods.

For let us suppose that the finder of the article lost, whilst ignorant of the true owner, should have been wrongfully deprived of it by a third person. In this case, the owner being absent, the finder is evidently entitled to the possession of the thing; and he will accordingly succeed in an action of trover brought by him against the wrong-doer (*j*). Here the property in

If the finder should be deprived, he may maintain *trover*.

(*f*) 3 Black. Com. 153.

Pleading, 354, 5th ed.

(*g*) *Addison v. Round*, 4 Ad. & Ell. 799; S. C. 6 Nev. & Man. 422; *Brooke v. Mitchell*, 6 N. C. 349; S. C. 8 Scott, 739.

(*i*) *Gordon v. Harper*, 7 T. Rep. 9; *Ferguson v. Cristall*, 5 Bing. 305; *Leake v. Loveday*, 4 Man. & Gr. 972; *Bradley v. Copley*, 1 C. B. 685.

(*h*) *Wilbraham v. Snow*, 2 Saund. 47; *Armory v. Delamirie*, 1 Str. 505; *Roberts v. W'yatt*, 2 Taunt. 268; *Legg v. Evans*, 6 Mee. & W. 36; Stephen on

(*j*) *Armory v. Delamirie*, 1 Str. 505; 1 Smith's Leading Cases, 151.

the thing which was lost evidently belongs still to the original owner; but the right of possession is in the finder, until the owner makes his appearance. The owner's property then draws with it the right of possession; and should the finder convert the article found to his own use, he in his turn will be liable to an action of *trover* in respect of the owner's right of possession. Thus, so far as we have already proceeded, we have found nothing more than a simple property in goods, existing with or without the right of possession. The action of *trover* tries the right of possession, and may or may not determine the property. For, strange as it may appear, there is no action in the law of England by which the property in goods is alone decided.

Bailment.

2. But the article in question, instead of being lost and found, may become the subject of *bailment*. Bailment is defined by Sir William Jones, in his admirable and classical Treatise on the Law of Bailment (*k*), to be a delivery of goods in trust, on a contract expressed or implied, that the trusts shall be duly executed, and the goods redelivered as soon as the trust or use for which they were bailed shall have elapsed or be performed. The term *bailment* is derived from the French word *bailler*, to deliver. The person who delivers the goods is called the bailor; the person to whom they are delivered the bailee. The trusts on which goods may be delivered are various: the principal are the following. They may merely be lent to a friend, or left in the custody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, or let out to hire (*l*). In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only;

(*k*) P. 117.

(*l*) See *Coggs v. Bernard*, 2 Ld. Raym. 909, 912.

and when any goods are *bailed*, the property still remains in the bailor (*m*). The possession of the goods, however, is evidently for the time being with the bailee. But if while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment.

Property remains in the bailor.

If the bailment should be what is called a *simple bailment*, as in the four first instances above mentioned, that is, a bailment which does not confer on the bailee a right to exclude the bailor from possession, in such a case either the bailee or the bailor may maintain an action of trover against the wrong-doer (*n*). The bailee may maintain this action, because the action depends only on the right to the possession which the bailee has by virtue of the bailment made to him (*o*); and the bailor may also maintain the action, because his property in the goods draws with it the right of possession, and the bailment is not of such a kind as to vest this right in the bailee solely. The bailee is rather in the situation of servant to the bailor, and the possession of the one is equivalent in construction of law to the possession of the other. But as it would be unjust that the wrong-doer should pay damages twice over for his offence, the recovery of damages by either bailee or bailor deprives the other of his right of action (*p*). If, however, the bailment should not be of the simple kind, but should confer on the bailee the right to exclude the bailor from the possession, here, though the property in the goods still remains in the bailor, the bailee alone can maintain an action of trover against any person who may have

Simple bailment.

Bailee or bailor may maintain trover.

Pawnee or hirer can alone maintain trover.

(*m*) *Franklin v. Neate*, 13 Mee. & W. 481. (*o*) *Sutton v. Buck*, 2 Taunt. 302.

(*n*) *Nicolls v. Bastard*, 2 C. M. & R. 659. (*p*) Bac. Abr. tit. Trover (C).

taken the goods and converted them to his own use. Thus the pawnee or hirer of goods can alone maintain an action of trover so long as the pawning or hiring continues (*q*). Here again we have the property in the goods still vested in one person, the bailor, drawing with it, in the case of simple bailment, the right to the possession, and, in the case of other bailments, temporarily disconnected from that right. If, however, any bailee, whatever be the nature of his bailment, should convert the goods bailed to him to his own use, he will by that act have determined the bailment; the property in the bailor will draw to it the right to immediate possession, and the bailor may accordingly recover damages for the act by an action of trover (*r*).

Lien.

3. The last case requiring notice in which goods may be in the possession of a person who has no property in them, is the case of the existence of a *lien* on the goods. A lien is the right of a person in the possession of goods to retain them until a debt due to him has been satisfied (*s*). A lien is either *particular* or *general*. A particular lien is a right to retain the particular goods in respect of which the debt arises. A general lien is a right to retain goods in respect of a general balance of an account. The former kind of lien is favoured in law; but the latter, having a tendency to prefer one creditor above another, is taken strictly (*t*). A particular lien is given by the common law over goods which a person is compelled to receive; thus carriers (*u*) and innkeepers (*x*) have a lien on the goods in their care;

Particular or general.

Particular lien.

(*q*) *Gordon v. Harper*, 7 T. R. 9; *Burton v. Hughes*, 2 Bing. 173; *Ferguson v. Cristall*, 5 Bing. 305; *Pain v. Whitaker*, Ry. & Moo. 99.

(*r*) *Cooper v. Willomatt*, 1 C. B. 672.

(*s*) 2 East, 235; 2 Rose, 357;

Smith's Compendium of Mercantile Law, 510.

(*t*) 3 Bos. & Pul. 494.

(*u*) *Skinner v. Upshaw*, 2 Lord Raym. 752.

(*x*) *Thompson v. Lacey*, 3 B. & Ald. 283. ☞

although an innkeeper cannot detain his guest's person, or take his coat off his back, to secure payment of his bill (*y*). A particular lien is also given by law to every person who by his labour or skill has improved or altered an article entrusted to his care: thus a miller has a lien on the flour he has ground for the cost of grinding (*z*); and a shipwright has a lien on a ship entrusted to him to repair for the costs of repairing it (*a*). So a lien may be claimed for training a horse, because he is improved by the labour and skill thus bestowed upon him (*b*); but no lien can arise merely for his keep (*c*), unless he has been kept by an innkeeper, who is compelled to take him in (*d*). A particular lien also arises in the case of salvage, or rescuing a ship or its lading from the perils of the sea or the queen's enemies, for the trouble and risk incurred (*e*); but this kind of lien does not extend to the saving of property from any other perils than those of the sea (*f*); for goods carried by sea are subject to such peculiar dangers, and the risks incurred in saving them are frequently so great, that principles of public policy have dictated the propriety of giving unusual encouragements to those who may engage in so dangerous a service (*g*).

A general lien, when it does not arise by express contract, or from a contract implied by the course of

(*y*) *Sunbolff v. Alford*, 3 Mee. & Wels. 248.

4 Tyr. 244, 252.

(*z*) *Ex parte Ockenden*, 1 Atk. 235.

(*d*) *Johnson v. Hill*, 3 Stark. 172.

(*a*) *Franklin v. Hosier*, 4 B. & Ald. 341.

(*c*) *Hartford v. Jones*, 1 Lord Raym. 393; *Baring v. Day*, 8 East, 57. See Smith's Compendium of Mercantile Law, 295.

(*b*) *Bevan v. Walters*, 1 Moo. & Mal. 236.

(*f*) *Nicholson v. Chapman*, 2

(*c*) *Wallace v. Woodgate*, 1 Ry. & Moo. 293. See *Sanderson v.*

II. Bla. 254.

Bell, 2 C. M. & W. 301, 311;

(*g*) 2 II. Bla. 257.

dealing between the parties (*h*) accrues in consequence of the custom of some trade or profession; and it may be local also, that is, confined to some particular place (*i*). It obtains in many trades, such as wharfingers (*k*), dyers (*l*), calico printers (*m*), factors (*n*), policy brokers (*o*), and bankers (*p*), and perhaps also common carriers (*q*). Solicitors and attornies have also a lien on all the deeds and documents of their clients in their possession for their professional charges generally (*r*); but this doctrine is to be taken in connection with the peculiar nature of title deeds, which being the sinews of the land, follow the seisin of it, and may therefore be held by the client only for a limited interest. Thus, if a tenant for life should leave the title deeds of the land in the hands of his solicitor, the lien of the solicitor for his professional charges would be coextensive only with his client's interest, and on the client's decease the solicitor would be bound to deliver up the deeds to the remainder-man, although his charges might remain unpaid (*s*). So if the client should be a mortgagee, the solicitor having the deeds would be bound to deliver them to the mortgagor, on the reconveyance of the property, on payment to the mortgagee of all principal and interest; for on such reconveyance the mortgagee ceased to have

Solicitor's lien.

(*h*) *Simond v. Hibbert*, 1 Russ. & Myl. 719.

(*i*) *Holderness v. Collinson*, 7 Barn. & Cress. 212.

(*k*) *Naylor v. Mangles*, 1 Esp. 109.

(*l*) *Savill v. Barchard*, 4 Esp. 53. See however *Close v. Waterhouse*, 6 East, 523, n.

(*m*) *Weldon v. Gould*, 3 Esp. 268.

(*n*) *Houghton v. Matthews*, 3 Bos. & Pul. 488; *Cowell v. Simpson*, 16 Ves. 280.

(*o*) *Man v. Shiffner*, 2 East, 523.

(*p*) *Davis v. Bowsher*, 5 T. R. 488; *Brandao v. Barnett*, 3 C. B. 519, 530.

(*q*) See *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224; *Aspinall v. Pickford*, 3 Bos. & Pul. 44, note.

(*r*) *Stevenson v. Blakelock*, 1 Mau. & Sel. 535; *Ex parte Sterling*, 16 Ves. 258; *Ex parte Pemberton*, 18 Ves. 282.

(*s*) *Davies v. Vernon*, 6 Q. B. 443, 447.

any interest in the lands (*t*). And in like manner if the client should be a mortgagor, the solicitor would have no right to retain the deeds as against the prior claim of the mortgagee (*u*); and if the client should be a trustee, the deeds must be given up for the purposes of the trust (*x*). This lien also extends only to charges strictly professional (*y*), and to documents in the possession of the attorney or solicitor in his professional character (*z*). And a mere certificated conveyancer has no general lien on the documents in his hands (*a*).

Lien, then, of whatever kind, is merely a right to retain the *possession* of the goods. This right of possession enables the person who has been in possession by virtue of the lien to maintain an action of trover for the goods (*b*); but the *property* in the goods still remains with the owner; and if the person having the lien should give up the possession of the goods, his lien will be lost (*c*); the owner's property in them will draw to it the right of possession, and enable him to maintain an action of trover (*d*). And if the person having the lien should take a security for his debt, payable at a distant day, his lien would on that account be lost, as it would be unreasonable that he should detain the goods till such future time of payment (*e*); and in this case also an action of trover may be maintained by the owner

Property of
goods subject to
lien is in the
owner.

How lien is
lost.

(*t*) *Wakefield v. Newbon*, 6 Q. B. 276.

(*u*) *Smith v. Chichester*, 2 Dr. & War. 393; *Blunden v. Desart*, *id.* 405.

(*x*) *Baker v. Henderson*, 4 Sim. 27.

(*y*) *The King v. Sankay*, 5 Ad. & Ell. 423; *Worrall v. Johnson*, 2 Jac. & Walk. 218.

(*z*) *Champernown v. Scott*, 6

Madd. 93; *Balch v. Symes*, T. & Russ. 87.

(*a*) *Hollis v. Cluridge*, 4 Taunt. 807; *Steadman v. Hockley*, 15 Mee. & Wels. 553.

(*b*) *Legg v. Evans*, 6 Mee. & Wels. 36.

(*c*) *Kruges v. Wilcox*, Amb. 254.

(*d*) *Sweet v. Pym*, 1 East, 4.

(*e*) *Cowell v. Simpson*, 16 Ves.

275.

of the goods, by virtue of the right of possession now accrued to him in respect of his property (*f*).

In all the above cases of finding of goods, bailment and lien, it appears clear, therefore, that the property in the goods is still simply vested in one party only, although the right to their immediate possession may be in another party, and the actual possession possibly in a third.

(*f*) *Hewison v. Guthrie*, 2 New Cas. 756, 759.

CHAPTER III.

OF THE ALIENATION OF CHoses IN POSSESSION.

CHoses in possession have always been freely alienable from one person to another. The feudal principles of tenure, which in ancient times opposed the alienation of landed estates, could have no application to the then insignificant subjects of personal property; although the full right of testamentary disposition was not, as we shall hereafter see, enjoyed in early times. But, though the property in personal chattels may be freely aliened, it is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have. A person who has an interest in land may grant all the fruit which may grow upon it hereafter (*a*). So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool (*b*). But a grant of the wool of all the sheep which a man ever shall have, is void (*c*). And in the same manner the assignment of a man's stock in trade passes only such articles as are his property at the time he executes such assignment, and will not comprise any other articles which he may afterwards purchase (*d*); not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling house (*e*).

A grant cannot be made of that in which a man has no actual or potential property.

(*a*) *Grantham v. Hawley*, Hob. 132; *Petch v. Tutin*, 15 Mee. & Wels. 110.

(*b*) *Per Pollock*, C. B., 15 Mee. & Wels. 116.

(*c*) Com. Dig. tit. Grant (D).

(*d*) *Tapfield v. Hillman*, 6 Man. & Gr. 245; S. C. 6 Scott, N. R. 967.

(*e*) *Lunn v. Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B.

850

Ancient mode
of conveying
real property.

Modes of alien-
ation of per-
sonal chattels.

Gift and deli-
very.

The manner in which the alienation of personal chattels is effected, is in many respects essentially different from the modes of conveying real estate. In ancient times, indeed, there was more similarity than there is at present. The conveyance of land was then usually made by feoffment, with livery of seisin, which was nothing more than a simple gift of an estate in the land, accompanied by delivery of possession (*f*). This gift might then have been made by mere word of mouth (*g*); but the Statute of Frauds (*h*) made writing necessary; and now every conveyance of landed property is required to be by deed (*i*). Personal chattels, on the contrary, are still alienable by mere *gift and delivery*; though they may be disposed of by *deed*; and they are also assignable by *sale*, in a manner totally different from the conveyance requisite on the transfer of real estate. Each of these three modes of conveyance deserves a separate notice.

1. And first, personal chattels are alienable by a mere gift of them, accompanied by delivery of possession. For this purpose no deed or writing is required, nor is it essential that there should be a consideration for the gift. Thus, if I give a horse to A. B., and at the same time deliver it into his possession, this gift is complete and irrevocable, and the property in the horse is thenceforward vested in A. B. (*k*). But if I purport to assign the horse, and yet retain the possession, the gift, though made by writing (so that it be not a deed), is absolutely void at law (*l*), and equity will give no relief to the donee (*m*). It may however be observed,

(*f*) See Principles of the Law
of Real Property, 108.

(*g*) *Ibid.* p. 113.

(*h*) Stat. 29 Car. II. c. 3, ss.
1, 2.

(*i*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*k*) 2 Black. Com. 441.

(*l*) *Irons v. Smallpiece*, 2 Barn.
& Ald. 551; *Miller v. Miller*,
3 P. Wms. 356.

(*m*) *Antrobus v. Smith*, 12 Ves.
39, 46; *Edwards v. Jones*, 1 My.
& Cr. 226; *Dillon v. Coppin*,
4 My. & Cr. 647, 671.

that if the donor should not attempt to part with the subject of gift, but should declare that he keeps possession of it *in trust* for the donee, equity will seize on and enforce this trust, although voluntarily created (*n*). In some cases it is not possible to make an immediate and complete delivery of the subject of gift; and in these cases, as near an approach as possible must be made to actual delivery; and if this be done, the gift will be effectual. Thus if goods be in a warehouse, the delivery of the key will be sufficient (*o*); timber may be delivered by marking it with the initials of the assignee (*p*), and an actual removal is not essential to the delivery of a haystack (*q*). But the delivery of a part of goods capable of actual delivery, is not a sufficient delivery of the whole (*r*).

Trust though voluntary enforced inequity.

When goods are in the custody of a simple bailee, such as a wharfinger or carrier, the possession of such bailee is, as we have seen (*s*), constructively the possession of the bailor; and either the bailor or bailee may maintain an action of trover in respect of the goods. This constructive possession of the bailor may be delivered by him to a third person, by making as near an approach to actual delivery as is possible under the circumstances of the case. By the custom of Liverpool the delivery of goods in another person's warehouse is effected by merely handing over a delivery order (*t*); and the property in wines in the London Docks ap-

Constructive delivery when goods are in the custody of a simple bailee.

Dock warrant.

(*n*) *Ellison v. Ellison*, 6 Ves. 356; *Ex parte Dubost*, 18 Ves. 140, 150.

(*o*) *West v. Skip*, 1 Ves. sen. 244; *Ryall v. Rowles*, 1 Ves. sen. 362; 1 Atk. 171; *Ward v. Turner*, 2 Ves. sen. 443.

(*p*) *Stoveld v. Hughes*, 14 East, 308.

(*q*) *Chaplin v. Rogers*, 1 East, ~~100~~. 192

(*r*) *Per Pollock*, C. B., 14 Mee. & Wels. 37, correcting a dictum of Taunton, J., 2 Ad. & El. 73.

(*s*) *Ante*, p. 25.

(*t*) *Dixon v. Yates*, 5 Barn. & Adol. 313; and see *Greaves v. Hepke*, 2 Barn. & Ald. 131.

Bill of lading.

appears to pass by the indorsement and delivery of the dock warrant (*u*). But in the absence of a custom to the contrary, it would seem that there can be no legal delivery of goods in the hands of a third person without the consent of the warehouseman or wharfinger in whose custody the goods are (*x*). When goods are at sea, the delivery of the bill of lading, after its indorsement, is a delivery of the goods themselves (*y*); for it is not possible, in this case, to make any nearer approach to an actual delivery (*z*).

Alienation by deed.

2. The next method of alienating chattels personal is by deed. Every deed imports a consideration (*a*); for it was anciently supposed, that no person would do so solemn an act as the sealing and delivery of a deed without some sufficient ground. The presence of this implied consideration renders a deed sufficient of itself to pass the property in goods (*b*). It supplies on the one hand the want of delivery, and on the other the want of that actual consideration which always exists in the third and most usual mode of alienation of chattels personal, which is,

Sale.

Effect of a contract for the sale of lands.

3. By sale. It is in this last and most usual method of alienation that the contrast presents itself between the means to be employed for the alienation of real property and chattels personal. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor; and it

(*u*) *Ex parte Davenport*, Mon. & Bl. 165.

(*x*) *Swinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorrien*, *ibid.* 278; *Bryans v. Nix*, 4 Mee. & Wels. 775, 791.

(*y*) *Mitchel v. Ede*, 11 Ad. & Ell. 888.

(*z*) 1 Ves. sen. 362; 1 Atk. 171.

(*a*) Plowd. 308; 3 Burr. 1639; 1 Fonb. Eq. 342; 2 Fonb. Eq. 26; Principles of the Law of Real Property, 114.

(*b*) *Carr v. Burdiss*, 1 C. M. & R. 782, 788; S. C. 5 Tyrw. 309, 316.

is not transferred to the vendee until the vendor shall have executed and delivered to him a proper deed of conveyance. In *equity*, it is true, that the lands belong to the purchaser from the moment of the signature of the contract; and from the same moment, the purchase-money belongs, in equity, to the vendor (*e*). But at *law* the only result of the signature of a contract for the sale of lands is, that each party acquires a right to sue the other for pecuniary damages, in case such contract be not performed. Not so, however, the case of a contract for the sale of chattels personal. Such a contract immediately transfers the legal property in the goods sold from the vendor to the vendee, without the necessity of any thing further (*d*). In order to this, it is of course necessary, that the transaction have within itself all the legal requisites for a sale; and these requisites will accordingly form the next subject for our consideration.

Contract for sale of goods transfers the property.

The requisites for the sale of goods partly depend upon their value. Goods under the value of 10*l.* sterling may now be sold in the same manner as goods of whatever value were anciently saleable; whereas goods of the value of 10*l.* or upwards are now regulated in their sale by an enactment contained in the Statute of Frauds (*e*). And first, with regard to such goods and chattels as do not fall within this enactment, there can be no sale without a tender or part payment of the money, or a tender or part delivery of the goods, unless the contract is to be completed at a future time. Thus if A. should agree to pay so much for the goods, and B., the owner, should agree to take it, and the parties should then separate without anything further passing, this is no sale (*f*). But if A. should tender the money,

Requisites for the sale of goods under the value of 10*l.*

(*e*) Principles of the Law of Real Property, 127.

(*e*) 29 Car. II. c. 3, s. 17.

(*f*) 2 Bla. Com. 447; Smith's

(*d*) Com. Dig. tit. Biens (D 3). Mercantile Law, 436.

or pay but a penny of it, or B. should tender the goods, or should deliver any, even the smallest portion, of them to A., or if the payment or delivery or both should be postponed by agreement till a future day, the sale will be valid, and the property in the goods will pass at once from the vendor to the vendee (*g*). If, however, any act should remain to be done on the part of the seller previously to the delivery of the goods, the property will not pass to the vendee until such act shall have been done. Thus if goods, the weight of which is unknown, are sold by weight (*h*), or if a given weight or measure is sold out of a larger quantity (*i*), the property will not pass to the vendee until the price shall have been ascertained by weighing the goods in the one case, or the goods sold shall have been separated by weight or measure in the other. So if an article be ordered to be manufactured, the property in it will not vest in the person who gave the order, until it shall, with his assent, have been appropriated for his benefit (*k*).

Requisites for
the sale of goods
of the value of
10*l.* or upwards.
Statute of
Frauds.

But with regard to goods of the value of 10*l.* or upwards, additional requisites have been enacted by the seventeenth section of the Statute of Frauds (*l*), which provides "that no contract for the sale of any goods, wares, and merchandizes for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such con-

(*g*) *Shep. Touch.* 221; *Martindale v. Smith*, 1 Q. B. 389, 395.

(*h*) *Hanson v. Meyer*, 6 East, 614; *Swanwick v. Sothorn*, 9 Ad. & Ell. 895.

(*i*) *Busk v. Davis*, 2 Mau. &

Selw. 397; *Shepley v. Davis*, 5 Taunt. 617.

(*k*) *Atkinson v. Bell*, 8 B. & Cress. 277; *Wilkins v. Bromhead*, 6 Man. & Gr. 963, 973.

(*l*) 29 Car. II. c. 3.

tract, or their agents thereunto lawfully authorized." And by a modern statute (*m*), this enactment "shall extend to all contracts for the sale of goods of the *value* of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

The above section of the Statute of Frauds has been interpreted by a vast number of cases decided on almost every one of the phrases it contains (*n*). The chief difficulty has been to determine the exact meaning of the acceptance of part of the goods and actual receipt of the same, required on the part of the buyer, and to ascertain in each particular case whether such acceptance and actual receipt have taken place or not. The acceptance required appears to be such as shall preclude the purchaser from afterwards objecting to the quality of the goods (*o*). Actual receipt seems, according to a great preponderance of authority, to mean receipt of the possession of the goods, and to be merely correlative to delivery of possession on the part of the vendor (*p*). There must, therefore, be an actual transfer of the article sold, or some part thereof, by the seller, and an actual taking possession of it by the buyer (*q*). The possession of a simple bailee is, however, as we have seen (*r*), constructively the possession of the bailor. If,

What is an acceptance and actual receipt within the statute.

(*m*) Stat. 9 Geo. IV. c. 14, s. 7. See *Hoadley v. McLaine*, 10 Bing. 482, 486.

See, however, *Bushel v. Wheeler*, Q. B. 8 Jurist, 532.

(*p*) Smith's Mercantile Law, 447, n. (s).

(*q*) *Baldev v. Parker*, 2 B. & Cress. 37, 41.

(*r*) *Ante*, p. 25.

(*n*) See Smith's Mercantile Law, 443, *et seq.*

(*o*) *Per Alderson, B., Norman v. Phillips*, 14 M. & W. 277, 283.

therefore, any part of the goods be delivered to an agent of the vendee, or to a carrier named by him, this is a sufficient receipt by the vendee himself(s); and if the goods should be in the possession of a warehouseman or wharfinger at the time of sale, the receipt by the purchaser of a delivery order, provided it were coupled with the assent of the bailee, would be a sufficient receipt of the goods within the statute (t). The wharfinger holds the goods as the agent of the vendor, until he has agreed with the purchaser to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the purchaser, and the possession of such wharfinger is that of the purchaser; and then only is there a constructive delivery to him (u).

The requisitions of the statute are in the alternative.

The requisitions of the statute, it will be observed, are in the alternative. Either the buyer must accept part of the goods sold, and actually receive the same, or he must give something in earnest or in part of payment, or some note or memorandum in writing must be signed. The two former alternatives are left as they were before the statute; but the last is a new requisition, which must be observed in the absence of either of the former. The effect of the statute, therefore, is to abolish tender and mere words as sufficient for a sale, and to substitute for them the more exact evidence of a note or memorandum in writing. But as the memorandum may be signed by an agent lawfully authorized, the bought-and-sold notes given by a broker are a sufficient memorandum within the meaning of the statute (x). And it is held that the entry of a purchaser's name by an auctioneer's clerk at an auction is also sufficient to satisfy

Memorandum in writing.

(s) *Dawes v. Peck*, 8 T. Rep. 330.

(t) *Bentall v. Burn*, 3 B. & Cress. 423. See *ante*, p. 34.

(u) *Farina v. Horne*, 16 M. & W. 119, 123.

(v) *Grove v. Aflalo*, 6 B. & Cress. 117.

the statute, as the clerk is, for that purpose, the authorized agent of the purchaser (*y*). But one of the contracting parties to a sale cannot be the agent of the other for the purpose of signing a memorandum of the bargain (*z*).

If the agreement is not to be performed within the space of one year from the making thereof, then, however small be the value of the goods, no action can be brought upon it, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This is another provision of the Statute of Frauds (*a*), and will be hereafter noticed more particularly.

When the agreement is not to be performed within a year.

Although the property in goods sold passes, as we have seen (*b*), from the vendor to the vendee, immediately upon the execution of a valid contract for sale, yet the possession of the goods of course remains with the vendor until he deliver them, which he is bound to do when the purchaser is ready to pay the price (*c*), but not before (*d*). And so long as the vendor retains actual or constructive possession of the goods, he has a lien upon them for so much of the purchase-money as may remain unpaid (*e*). But when the goods are once delivered by the vendor out of his own actual or constructive possession, his lien is gone; for lien in law is, as we have seen (*f*), merely a right to retain possession, and not to recover it when given up.

Vendor's lien.

(*y*) *Bird v. Boulter*, 4 B. & Adol. 443.

(*d*) *Bloxam v. Sanders*, 4 Barn. & Cress. 941.

(*z*) *Farebrother v. Simmons*, 5 B. & Ald. 333.

(*e*) *Dixon v. Yates*, 5 Barn. & Adol. 313; *Lackington v. Ather-ton*, 7 Man. & G. 360.

(*a*) 29 Car. II. c. 3, s. 4.

(*b*) *Ante*, p. 35.

(*f*) *Ante*, p. 29.

(*c*) *Rawson v. Johnson*, 1 East, 203.

Stoppage in transitu.

First allowed by Court of Chancery.

Under certain circumstances, however, the vendor of goods has a right to resume their possession, with which he had previously parted under a contract for sale. This right is called the right of *stoppage in transitu*; and it occurs when goods are consigned entirely or partly (*g*) on credit from one person to another, and the consignee becomes bankrupt or insolvent before the goods arrive. In this event the consignor has a right to direct the captain of the ship, or other carrier, to deliver the goods to himself or his agent instead of to the consignee, who has thus become unable to pay for them. The right of stoppage in transitu was first allowed and enforced only by the Court of Chancery, which, in the exercise of its equitable jurisdiction, considered that, under the circumstances above mentioned, it was very allowable in equity for the consignor to get his goods again into his own hands (*h*). But the right was subsequently acknowledged by the courts of law; and it is now constantly enforced by them. As this right was originally of equitable origin, it cannot be expected to depend on strictly legal principles; and the doctrines of law on this particular subject are in fact unlike its usual doctrines on other matters. Thus it is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not, or that a second purchaser should stand in a better position than his vendor (*i*); but the consignee of goods may, by endorsing the bill of lading to a *bonâ fide* indorsee, defeat the consignor's right to stop in transitu (*k*). So a delivery of goods into the possession of a carrier appointed by the vendee is, in

(*g*) *Hodgson v. Loy*, 7 T. R. 410.

(*h*) *Wiscman v. Vandeputt*, 2 Vern. 203; *Sace v. Prescott*, 1 Atk. 245.

(*i*) *Dixon v. Yates*, 5 Barn. & Adol. 339.

(*k*) *Lickbarrow v. Mason*, 2 T.

R. 63; 1 H. Bl. 357; 6 East, 21; 1 Smith's Leading Cases, 388; *Jenkyns v. Usborne*, 7 Man. & Gr.

678, 699.

construction of law, a delivery to the vendee himself, and divests the vendor's lien for the unpaid purchase-money (*l*); but until the *transitus* is completely ended, or the goods come to the actual possession of the vendee, the vendor's right to stop them in transitu may still be exercised in the event of the bankruptcy or insolvency of the vendee (*m*), unless indeed such right be defeated, as we have said, by a *bonâ fide* indorsement of the bill of lading. Thus, although by the sale of the goods the property in them, involving the risk of their loss, passes to the purchaser, and although the possession of them be delivered to a carrier named by him, still such possession may be resumed by the vendor during the journey, in the event of the bankruptcy or insolvency of the vendee. As this right is a departure from legal principles on the vendor's behalf, it is allowed only in one of the two cases of bankruptcy or insolvency, by which latter term appears to be here meant a general inability to pay, evidenced by stoppage of payment (*n*). When possession of goods has been resumed by the vendor under his right of stoppage in transitu, he is restored to the lien for the unpaid purchase-money which he had before he parted with such possession; but, according to the latter opinion, the contract for sale is not thereby rescinded (*o*).

There is one case in which the property in goods passes from one person to another by payment of their value without any actual sale. In an action of trover (*p*)

A recovery in trover vests the property in the defendant.

(*l*) *Daves v. Peck*, 8 T. R. 330; *ante*, p. 37; *Wilmshurst v. Bowker*, in error, 7 Man. & Gr. 882.

(*m*) *Holst v. Pouwal*, 1 Esp. 240; *Northey v. Field*, 2 Esp. 613; *Jackson v. Nichol*, 5 New Cases, 508, 519.

(*n*) See Smith's Merc. Law,

501, note. The case of *Wilmshurst v. Bowker*, 5 New Cas. 541, 7 Scott, 561, 2 Man. & G. 812, was reversed in error, 7 Man. & Gr. 882.

(*o*) *Bloxam v. Sanders*, ⁴ Barn. & Cress. 949; 1 Smith's Leading Cases, 432.

(*p*) See *ante*, p. 22.

the plaintiff is entitled to damages equal to the value of the property he has lost, but not further, unless he has sustained any special damage. The defendant therefore, having paid the amount of the damages, is entitled to retain the goods in respect of which the action was brought; and the property in them vests in him accordingly (*q*).

Alien.

The alienation of personal chattels is prohibited to be made by certain persons and for certain objects. And first with respect to persons. An *alien* or foreigner is under great restrictions as to the acquirement of real estate (*r*); but with respect to personal chattels he stands on the same footing as a natural-born subject; for by the recent act to amend the laws relating to aliens (*s*), it is enacted (*t*) that from and after the passing of the act, any alien, being the subject of a friendly state, shall and may take and hold by purchase, gift, bequest, representation or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges and capacities, as if he were a natural-born subject of the united kingdom. The gift of an *infant* or person under the age of twenty-one years is voidable (*u*), and that of an *idiot* or *lunatic* appears to be absolutely void (*x*): in this respect the law of personal chattels is now the same as that of real estate (*y*). Married women also are incapable of making any disposition of personal chattels, except such as may be settled in equity in trust for their own *separate use*; for marriage is an absolute gift in law of all the wife's

Infant, idiot
and lunatic.

Married wo-
men.

(*q*) *Cooper v. Shepherd*, 3 C. B. 266, 272.

(*r*) See Principles of the Law of Real Property, 53.

(*s*) Stat. 7 & 8 Vict. c. 66, explained by stat. 10 & 11 Vict. c. 83.

(*t*) Sect. 4.

(*u*) Bac. Abr. tit. Infancy and Age (I) 3.

(*x*) *Ibid.* tit. Idiots and Lunatics (F).

(*y*) See Principles of the Law of Real Property, 54.

choses in possession to her husband, as well those she is possessed of at the time of the marriage, as those which come to her during her coverture (z). Persons convicted of treason or felony forfeit on such conviction the whole of their goods and chattels to the crown; and nothing but a *bonâ fide* alienation for a valuable consideration, made previously to conviction, can avert such forfeiture (a). When a felony is not capital, the punishment endured has the effect of a pardon (b); but the restoration to civil rights does not take effect till the determination of the period of punishment. All personal property, therefore, which accrues to a felon during his transportation is forfeited to the crown (c); but a mere contingent interest will not be forfeited, if it do not vest until the expiration of the period of banishment (d).

Convicts.

With regard to the objects for which the alienation of chattels personal are prohibited, gifts to charitable purposes are not restricted, neither are corporations excepted objects, as in the case of landed property (e). But by a statute of the reign of Elizabeth (f), the gift or alienation of any lands, tenements, hereditaments, *goods and chattels*, made for the purpose of delaying, hindering, or defrauding creditors, is rendered void as against them, unless made upon *good*, which here means *valuable*, consideration and *bonâ fide* to any person not having at the time of such gift any notice of such fraud. The fraudulent purpose intended by this statute can of

Gift for defrauding creditors.

(z) Co. Litt. 300 a; 1 Rep. Husb. & Wife, 169. See *post*, the chapter on Husband and Wife.

(a) 3 Rep. 82 b; 4 Bla. Com. 387, 388; *Perkins v. Bradley*, 1 Hare, 219.

(b) Stat. 9 Geo. IV. c. 32, s. 3.

(c) *Roberts v. Walker*, 1 Russ. & M. 752.

(d) *Stokes v. Holden*, 1 Keen, 145.

(e) See Principles of the Law of Real Property, 55.

(f) Stat. 13 Eliz. c. 5. See stat. 6 Geo. IV. c. 16, s. 73; also 1 & 2 Vict. c. 110, s. 59; 7 & 8 Vict. c. 96, s. 19.

course only be judged of by circumstances. Thus it has been held that if the owner of goods make an absolute assignment of them by deed to one of his creditors, and yet remain in the possession of the goods, such remaining in possession is a badge of fraud, which renders the assignment void, by virtue of the statute, as against the other creditors (*g*). But if the assignment be made to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment, the possession of the debtor, being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning of the statute (*h*). Such a transaction is in fact a *mortgage* of the goods, analogous to a mortgage of lands (*i*). The property in the goods passes at law by the deed to the mortgagee (*k*), whilst the possession of them rightfully remain with the mortgagor. The mortgagee therefore cannot maintain an action of trover for the goods against a stranger, until default has been made by the mortgagor in payment of the money secured (*l*). In this respect a mortgage of goods differs from a mere pledge, in which the property in the goods remains with the pledgor, and the pledgee obtains possession only, the right to retain which constitutes his lien for the money he has advanced (*m*), and enables him to main-

Mortgage of goods.

(*g*) *Ticynne's case*, 3 Rep. 80 b; 1 Smith's Leading Cases, 1; *Edwards v. Harben*, 2 T. Rep. 587.

(*h*) *Edwards v. Harben*, 2 T. Rep. 587; *Martindale v. Booth*, 3 Barn. & Adol. 498; *Reed v. Wilmot*, 7 Bing. 577.

(*i*) See Principles of the Law of Real Property, 331.

(*k*) *Gale v. Burnell*, 7 Q. B. 850.

(*l*) *Bradley v. Copley*, 1 C. B. 685. If the mortgagor should retain possession *after* default in payment at the time specified, it may be doubted whether the security would not then be void as against creditors under the statute of Elizabeth, for by the terms of the deed, the mortgagor is only to enjoy possession *until* default.

(*m*) *Ante*, p. 26.

tain an action of trover (*n*). The chief disadvantage in a mortgage of goods is, that, as the goods continue in the possession of the mortgagor as reputed owner, they will, by virtue of provisions in the bankrupt and insolvent acts, become liable, in the event of his bankruptcy or insolvency, to be sold for the benefit of his creditors generally (*o*). And even if the mortgagee should have obtained possession of the goods, he will not be allowed to avail himself of his bill of sale, in the event of the subsequent insolvency of his debtor (*p*).

Choses in possession have long been liable to involuntary alienation for the payment of the debts of their owner. On the decease of any person, his personal property generally has always been liable, in the first place, to the payment of his debts of every kind. And if a creditor take proceedings against his debtor in the debtor's lifetime, a sale of his goods and chattels may be procured by means of a writ of *feri facias* (*fi. fa.*) issued in *execution* of the *judgment* of the court. This writ is of very ancient date, and is usually said to be given by the common law; though some suppose that its name arose from the wording of the statute of Edward I. (*q*), by which the writ of *elegit* was provided (*r*). The writ directs the sheriff to cause the debt to be realized out of the goods and chattels of the debtor, *quod fieri facias de bonis et catallis*, &c.; and a sale of the goods is made by the sheriff accordingly.

Involuntary
alienation for
payment of
debts.

Writ of fieri
facias.

(*n*) *Legg v. Evans*, 6 Mee. & Wels. 36.

(*o*) *Ryall v. Rolle*, 1 Atk. 165, 170; S. C. nom. *Ryall v. Rowles*, 1 Ves. sen. 348; stat. 6 Geo. IV. c. 16, s. 72; 1 & 2 Vict. c. 110, s. 57; 7 & 8 Vict. c. 96, s. 17. See *post*, p. 47.

(*p*) Stat. 1 & 2 Vict. c. 110, s. 61. See *Hunt v. Robins*, 3 Q.

B. 300. See also stat. 7 & 8 Vict. c. 96, s. 21, which is differently worded from the corresponding section of the other act.

(*q*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second. See *Principles of the Law of Real Property*, 59.

(*r*) Bac. Abr. tit. Execution (C).

Goods however are not, like lands, affected by the mere entry of a *judgment* of a court of law against their owner. The debtor was always allowed to alienate his goods until the writ of execution was issued; although, by a fiction of law, all judicial proceedings, writs of execution included, formerly related back to the first day of the term to which they belonged(s). Goods, therefore, which had been sold after the first day of a term, might yet practically have been seized under a writ of *fi. fa.* relating back to that day, but subsequently issued. To remedy this evil, it was enacted by one of the sections of the Statute of Frauds(t), that no writ of fieri facias or other writ of execution shall bind the property of the goods against which it is sued, but from the time that such writ shall be delivered to the sheriff, undersheriff, or coroners, to be executed; and the officer is required, upon receipt of the writ, to indorse on it (without fee) the day of the month and year on which he received it. Goods and chattels may therefore be safely alienated, although judgment may exist against the owner, provided a writ of execution be not actually in the hands of the sheriff. And an alienation to secure or satisfy another creditor is not void within the above-mentioned statute of the 13 Elizabeth(u), although made with the intention of defeating an expected execution of the judgment creditor(x). Besides the sale of goods under the writ of *feri facias*, there might also be a writ of *levari facias*, now disused, by which the sheriff levied the corn and other present profit which grew on the lands, together with the rents then due, and the cattle thereon(y). And by the writ of *elegit*, the goods of the debtor are delivered to his creditor at an appraised

Statute of
Frauds.

Levari facias.

Elegit.

(s) Com. Dig. tit. Execution
(D 2); *Anon.* 2 Ventr. 218. See
2 Sugd. Vend. & Pur. 9th ed.
198.

(t) Stat. 29 Car. II. c. 3, s. 16.

(u) Stat. 13 Eliz. c. 5.

(x) *Wood v. Dixie*, 7 Q. B.
892.

(y) 2 Wms. Saunders, 68 a,

n. (1).

value, together with possession of his lands (*z*). It has however been recently enacted, that the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade (not exceeding in the whole the value of five pounds), shall not be liable to seizure under any execution or order of any court against his goods and chattels (*a*).

Choses in possession are also liable to involuntary alienation on the bankruptcy of their owner. In this event all the personal estate of the bankrupt, where-soever the same may be found or known, vests at once in the assignees under the bankruptcy by virtue of their appointment (*b*); and in order to prevent traders from obtaining false credit from the possession of property which is not their own, it is provided (*c*) that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his *possession, order, or disposition*, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioner acting in the bankruptcy (*d*) shall have power to sell and dispose of the same for the benefit of the creditors. Similar provisions have also been made in favour of the assignees of persons taking the benefit of either of the acts for the relief of insolvent debtors (*e*).

Bankruptcy.

Personal estate of bankrupt vests in the assignees.

Goods in the possession, order, or disposition of a bankrupt or insolvent.

(*z*) *Pullen v. Purbecke*, 1 Ld. Raym. 346. See the present forms of this writ and of the writ of fi. fa., 9 Adol. & Ell. 986, *et seq.*, 5 New Cases, 366, *et seq.*

(*a*) Stat. 8 & 9 Vict. c. 127, s. 8.

(*b*) Stat. 6 Geo. IV. c. 16, s. 63; 1 & 2 Will. IV. c. 56, s. 25. See

post, the chapter on Bankruptcy.

(*c*) Stat. 6 Geo. IV. c. 16, s. 72; *Fawcett v. Fearn*, 6 Q. B. 20.

(*d*) Stat. 1 & 2 Will. IV. c. 56, s. 7; 5 & 6 Vict. c. 122, ss. 59, *et seq.*

(*e*) Stat. 1 & 2 Vict. c. 110, s. 57; 7 & 8 Vict. c. 96, s. 17. See *post*, the chapter on Insolvency.

CHAPTER IV.

OF SHIPS.

THERE is one important class of choses in possession which the policy of the law has rendered subject to peculiar rules, namely, ships and vessels. In order to encourage British shipping, many privileges with respect to the importation and exportation of goods have been conferred exclusively on British vessels (*a*); but no ship can, with some slight exceptions, be admitted to be a British ship unless duly registered and navigated as such (*b*). The rules respecting the navigation of British vessels do not fall within the scope of our present treatise; but their registration is important as affecting the property which may be held in them. By a recent act of parliament "for the registering of British vessels (*c*)," the laws on this subject have been consolidated, and the provisions of former acts re-enacted. According to these provisions, no ship can enjoy the privilege of a British vessel unless it be registered by the collector and comptroller of customs in the port of the united kingdom to which it belongs, or by other officers in the colonies and possessions abroad (*d*). Prior to registration, a declaration must be made by the owner of the vessel, or by a prescribed number of the owners if more than one, in a form provided by the act (*e*), stating when and where the ship was built, and the names, occupa-

British vessels.

Registration of
British vessels.

(*a*) Stat. 8 & 9 Vict. c. 88. The former statutes were 3 & 4 Will. IV. c. 54, and 6 Geo. IV. c. 109, besides earlier statutes.

(*b*) Stat. 8 & 9 Vict. c. 88, s. 13.

(*c*) Stat. 8 & 9 Vict. c. 89. The former statutes were 3 & 4 Will.

IV. c. 55; 6 Geo. IV. c. 110, and 4 Geo. IV. c. 41, besides earlier statutes.

(*d*) Stat. 8 & 9 Vict. c. 89, ss. 2, 3, 10, 11.

(*e*) Sect. 13.

tions and residences of the owners, and that they are British subjects, denizens, or naturalized, and that no foreigner, directly or indirectly, has any share or part interest in the ship. A certificate of registry is then given in a prescribed form (*f*), and a bond is taken from the master; and such of the owners as attend to make the above declaration, to the effect that the certificate shall be solely made use of for the service of the ship or vessel for which it is granted, and shall be delivered up in certain cases (*g*). The certificate accordingly always accompanies the ship. This certificate may be renewed, and the vessel registered *de novo*, if the certificate should be lost or mislaid (*h*), or on the conviction or absconding of any person who may have illegally detained it (*i*), or on any change of property in the ship (*j*). And if the owner or owners who shall have made the above declaration shall have transferred all their shares in the ship, or if the ship after registration should in any manner be altered, so as not to correspond with all the particulars contained in the certificate of her registry, then a new registration is imperative (*k*). But the name by which a vessel has been once registered can never afterwards be changed (*l*).

Certificate of
registry.

The property in every British vessel, of which there are more than one owner, is considered to be divided into 64 equal shares; and the proportion held by each owner is described in the registry as being a certain number of 64th shares. But the right to such small fractional shares as may exceed the number of 64th shares into which the property in any ship can be reduced, is not affected by reason of the same not having been registered. And partners in trade may hold any

Property in
British vessels
divided into 64
equal parts.

(*f*) Sect. 2.

(*g*) Sect. 23.

(*h*) Sect. 29.

(*i*) Sect. 30.

(*j*) Sect. 42.

(*k*) Sects. 11, 31.

(*l*) Sect. 27.

Thirty-two
owners only
admitted.

ship, or any share in a ship, in the name of the copartnership, without distinguishing the proportionate interest of each of the owners(*m*); the names of all the partners must however appear on the registry in addition to the name of the firm(*n*). No greater number than thirty-two persons can be legal owners of any ship at the same time; but this provision is not to affect the equitable title of minors, legatees, creditors or others exceeding that number, duly represented by or holding from any of the persons, within that number, registered as legal owners of any share; and three or more of the trustees of any joint stock company may, by permission of the commissioners of customs, obtain the registration of any ship or vessel belonging to the company, stating the name and description of the company instead of the names and descriptions of the shareowners(*o*). Subject, however, to these provisions, the registry of a person's name as owner is conclusive as to his title both at law and in equity; for the object of the act is to make a public accessible registry of the true ownership of all British vessels(*p*). If, therefore, three persons should register their ship in the names of two of them only, the third would be without any remedy for his share(*q*).

Rights and liabilities of part owners.

Part owners of ships are tenants in common, subject to certain rules enforced by the Court of Admiralty for the disposition of the ship in case of dispute(*r*). Each part owner is at full liberty to dispose of his share without the assent of the others; and the mere circumstance of owning a share in a ship will not make the owner personally liable for repairs or other outgoings in respect

(*m*) Sect. 35.

(*n*) *Slater v. Willis*, 1 Beav. 354, 361.

(*o*) Stat. 8 & 9 Vict. c. 89, s. 36.

(*p*) *Mestaer v. Gillespie*, 11 Ves. 621, 625. See *Davenport*

v. Whitmore, 2 My. & Cr. 177.

(*q*) *Battersby v. Smyth*, 3 Mad. 110; *Slater v. Willis*, 1 Beav. 354.

(*r*) See Abbot on Shipping, pt. i. c. 3; *Davis v. Johnston*, 4 Sim. 539.

of the ship(s). But a part owner will be personally liable for all debts on behalf of the ship incurred with his actual or implied consent. If, therefore, all the owners have agreed in appointing one of their number to be manager (or *ship's husband*, as he is termed(*t*)), or if the ship be placed under the management of the master, and the owners divide the profits(*u*), the ship's husband in the one case, or the master in the other, is thereby rendered the agent of each part owner: each part owner will accordingly be in these cases personally liable for the full amount of all debts which may be incurred for repairs and other necessary expenses. But the ship's husband has no right to insure the ship on behalf of the other owners without authority for that purpose either express or implied(*x*).

Whenever the property in any British ship or any part thereof shall, after registry, be sold to any other of her majesty's subjects, the same must be transferred by bill of sale or other instrument in writing (but which need not be a deed(*y*)), containing a recital of the certificate of registry, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever either in law or in equity. But no bill of sale is to be deemed void by reason of any error in the recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby(*z*); and owners

Transfer of property in British vessels.

(*s*) *Briggs v. Wilkinson*, 7 Barn. & Cress. 30, 35.
& Cress. 30.

(*x*) *Robinson v. Gleadow*, ubi supra.

(*t*) *Helme v. Smith*, 7 Bing. 709; S. C. 5 Moo. & Pay. 744;
Robinson v. Gleadow, 2 N. C. 156;
S. C. 2 Scott, 250.

(*y*) *Hunter v. Parker*, 7 Mec. & Wels. 322, 343.

(*z*) Stat. 8 & 9 Vict. c. 89, s.

(*u*) *Ex parte Bland*, 2 Rose, 34.
91; *Briggs v. Wilkinson*, 7 Barn.

Exempt from
stamp duty.

Must be regis-
tered.

Indorsement of
sale to be made
on the certifi-
cate of the ship's
registry.

of fractional parts of ships above the number of integral 64th parts into which the property in the ship can be reduced by division, may transfer the same one to another, or jointly to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale (*a*). And every bill of sale and other assignment of any ship or vessel, or any interest, share or property therein, either absolutely or by way of mortgage, is exempt from stamp duty (*b*). But no bill of sale or other instrument in writing shall be effectual to pass the property in any ship or vessel, or any share thereof, or for any other purpose, until registry is made of the following particulars: namely, the name, residence and description of the vendor or mortgagor, or of each vendor or mortgagor if more than one; the number of shares transferred; the name, residence and description of the purchaser or mortgagee, or of each purchaser or mortgagee if more than one; and the date of the bill of sale or other instrument, and of the production of it for registration. And if the vessel is not about to be registered *de novo*, the collector and comptroller of the port where the ship is registered are required to indorse the above particulars of such bill of sale or other instrument on the certificate of the ship's registry, when the same shall be produced to them for that purpose (*c*). Every bill of sale of a ship should therefore be registered immediately, and an indorsement of the sale should, as soon as practicable, be made on the certificate of registry; for the provisions of the Registry Act are such, that if the certificate of the ship's registry be not indorsed as above mentioned within thirty days from the registry of the sale or mortgage, if the ship be in the port to which she belongs, or within thirty days from her arrival in port, if she be at sea, a subsequent purchaser

(*a*) Sect. 35.

(*c*) Stat. 8 & 9 Vict. c. 89, s.

(*b*) Stat. 6 Geo. IV. c. 41, s. 1; 37.

8 & 9 Vict. c. 89, s. 35.

or mortgagee, by obtaining a prior indorsement of his bill of sale on the certificate of the ship's registry, may obtain priority over the former purchaser or mortgagee (*d*). The collector and comptroller of customs of any port where a ship may happen to be have also power to indorse, according to the act, the certificate of the ship's registry with any bill of sale, having first given notice to the collector and comptroller of the port to which the ship belongs, who are to send information of any other bill of sale previously registered (*e*).

When a transfer of any British ship, or of any share therein, is made only as a security for the payment of a debt or debts, either by way of mortgage, or by assignment to a trustee or trustees for sale, it is to be so stated in the registry of the transfer, and also in the indorsement of the transfer on the certificate of the ship's registry; and the transferee is not, by reason of such transfer, to be deemed to be the owner of the ship or share transferred; nor is the transferor to be deemed to have ceased to be owner, any more than if no such transfer had been made; except so far as may be necessary for the purpose of rendering the ship or share transferred available, by sale or otherwise, for the payment of the debt or debts, for securing the payment of which such transfer shall have been made (*f*). But, notwithstanding the mortgagor still continues to be owner, the right of the mortgagee, if his security be duly registered, will not be affected by the bankruptcy (*g*) or insolvency (*h*) of the mortgagor. A Bri-

Mortgage of ships.

(*d*) Sects. 38, 39. See *Ex parte Jones*, 2 Cro. & Jerv. 513; S. C. 2 Tyrwh. 671.

(*e*) Sect. 40.

(*f*) Sect. 45. *Irving v. Richardson*, 2 Barn. & Adol. 196.

(*g*) Sect. 46.

(*h*) Stat. 1 & 2 Vict. c. 110,

s. 57; 7 & 8 Vict. c. 96, s. 17. These acts refer to the former act for registering British vessels, 3 & 4 Will. 4, c. 55; but this act is not repealed by the present one, its provisions being merely re-enacted verbatim, with certain additions.

tish ship, therefore, forms an exception to the rule, that the whole legal estate or interest in all property mortgaged vests in the mortgagee. The mortgagor still retains a legal interest, which he may assign, subject to the mortgage (*i*); but should the mortgagee take possession of the vessel before the conclusion of her voyage, he will be entitled to the whole of the accruing freight for payment of his debt (*k*).

Charter-party.

Sometimes a vessel is hired for a given voyage. The instrument by which such hiring is effected is termed a charter-party. Whether the legal possession of the ship passes to the hirer (or charterer, as he is called) depends on the stipulations contained in the charter-party, such as whether the charterer or the owner is to provide the seamen, and keep the vessel in order (*l*). Where a merchant ship is open to the conveyance of goods generally, it is called a *general ship*. The receipt for the goods given by the master is called the *bill of lading*: it states that the goods are to be delivered to the consignee or his assigns; and by the custom of merchants, the bill of lading, when indorsed by the consignee with his name, becomes a negotiable instrument, the delivery of which passes the property in the goods (*m*). The money payable for the hire of a ship, or for the carriage of goods in it, is the *freight*, which, whether accrued or accruing, is assignable in the same manner as any other ordinary chose in action (*n*).

General ship.

Bill of lading.

Freight.

(*i*) *Ex parte Jones*, 2 Cro. & Jer. 513; S. C. 2 Tyrw. 671. *Steam Packet Company*, 8 Ad. & Ell. 835.

(*k*) *Dean v. M'Ghie*, 4 Bing. 45; S. C. 12 J. B. Moore, 185; (*m*) *Caldwell v. Ball*, 1 T. Rep. 205, 216.

Kerswill v. Bishop, 2 Cro. & Jer. 529; S. C. 2 Tyrw. 602. (*n*) *Douglas v. Russell*, 4 Sim. 524; 1 M. & K. 488; *Leslie v.*

(*l*) *Dean v. Hogg*, 10 Bing. 345; *Fenton v. City of London* *Guthrie*, 1 New Cases, 697.

PART II.

OF CHoses IN ACTION.

CHAPTER I.

OF ACTIONS EX DELICTO.

IN addition to moveable goods, or *choses in possession*, we have observed (*a*), that there existed also in ancient times *choses in action*, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong or the nonperformance of a contract, or else to procure the payment of money due. The actions to be thus brought were, of course, not real, but purely personal actions. Real actions were brought for the recovery of land or real property ; but the above mentioned actions were against persons only, and the object was merely to obtain from them money, being the only recompense generally available. In this respect the law has undergone no change. A money payment is all it can generally obtain for the person aggrieved (*b*) ; although equity, if resorted to in the Court of Chancery, will often give a more appropriate remedy, by issuing an *injunction* to restrain the wrong-doer from continuing his wrong, or by decreeing the *specific performance* of a contract. In many cases, however, money is a sufficient recompense ; and then the right to bring an action at law, in other words a legal chose in action, constitutes a valuable kind of personal property.

Money only is obtained by an action at law.

(*a*) *Ante*, p. 4.

(*b*) The actions of detinue and

replevin are exceptions, see *ante*, p. 3.

The infliction of a wrong, and the nonperformance of a contract, are evidently the two grand sources from which personal actions ought to proceed. If one man commits a wrong against another, justice evidently requires that he should give him satisfaction; and if one man enters into a contract with another, he certainly ought to keep it, or make reparation for its breach; or if the contract be to pay a sum of money, the money ought to be duly paid. Personal actions are accordingly divided by the law of England into two great classes, actions *ex delicto*, and actions *ex contractu* (c). The former arises in respect of a wrong committed, called in law French a *tort*; the latter, in respect of a contract made for the performance of some action, which thus becomes a *duty*, or for the payment of some money, which thus becomes a *debt*. Let us consider, in the present chapter, the right of action which occurs *ex delicto*, or in respect of a *tort*.

Actions *ex delicto* and *ex contractu*.

The ancient law, in its dread of litigation, confined the remedy by action for a *tort* or wrong committed, to the joint lives of the injurer and the injured. If either party died, the right of action was at an end, the maxim being *actio personalis moritur cum personâ* (d). In this rule, actions *ex delicto* only were included; of which, however, there seem to have been more than any other in early times. But by an early statute (e), the same action was given to the executor for any injury done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime. And by a recent statute (f), an action is given to the executors or administrators of any person de-

Maxim *actio personalis moritur cum personâ*.

Exceptions on death of the party injured.

(c) 3 Black. Com. 117.

(d) 1 Wms. Saund. 216 a, n. (1).

(e) Stat. 4 Edw. III. c. 7, *de bonis asportatis in vitâ testatoris*,

extended to executors of executors by stat. 15 Edw. III. c. 5.

(f) Stat. 3 & 4 Will. IV. c. 12, s. 2.

ceased, for any injury to the real estate of such person, committed within six calendar months before his death, for which an action might have been maintained by him; so that the action be brought within one year after the death of such person; and the damages, when recovered, are to be part of the personal estate of such person. And by a still more recent statute (*g*) it is provided, that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the wrong-doer shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Under this act, one action only can lie for the same subject-matter of complaint; and such action must be commenced within twelve calendar months after the death of the deceased (*h*), in the name of his executor or administrator (*i*), and must be for the benefit of the wife, husband, parents, grandfather and grandmother, stepfather and stepmother, children, grandchildren and stepchildren of the deceased, in such shares as the jury shall direct (*k*). Previously to this statute, a man who had been maimed by another could recover compensation for the injury; but if he died of his

(*g*) Stat. 9 & 10 Vict. c. 93.

(*h*) Sect. 3.

(*i*) Sect. 2.

(*k*) Sects. 2, 5. This act is a specimen of the common absurdity of modern acts of parliament, in introducing an interpretation clause in one section just to vary the meaning of another. It enacts in one section that the action shall be for the benefit of the wife, husband, parent and child; and in another section, that the

word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter. Now the words "parent" and "child" occur only in the one place just mentioned, besides this interpretation clause. Why not therefore say at once what is really intended?

perfectly unnecessary

wound, his family could obtain no recompense for the loss of a life which might have been their only dependence. And even now, when the death of a person is not *caused*, no action can be brought by his executor or administrator for any injury which affected him personally, if it did not touch his property. Thus it has been held, that an executor or administrator cannot have an action for a breach of promise of marriage with the deceased, where no special damage can be stated to have accrued to her personal estate (*l*).

Death of the
wrong-doer.

Not only the death of the injured party, but also that of the wrong-doer, formerly put an end to every action which arose from a *tort* or wrong; and this was the case up to a very recent period; although if the executor or administrator had profited by the wrong done, the injured party was able to recover from him the money or goods he had thus gained (*m*). But by a recent statute (*n*) an action may now be maintained against the executors or administrators of any person deceased, for any wrong committed by him within six calendar months before his death against another person, in respect of his property real or personal; so as such action be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person. And the damages to be recovered in such action are to be payable in the like order of administration as the simple contract debts of such person. The remedy afforded by this statute does not preclude such action as might have previously been brought against the executor or administrator (*o*).

(*l*) *Chamberlain v. Williamson*,
2 Mau. & Sel. 408, 415.

(*n*) Stat. 3 & 4 Will. IV. c. 42,
s. 2.

(*m*) *Powell v. Rees*, 7 Ad. & El.
426.

(*o*) *Powell v. Rees*, ubi supra.

There is one peculiar action founded on *tort*, to which, Action for dilapidations.
 from the nature of the case, the deceased himself cannot be liable, but which is maintainable by the common law against his executors or administrators. This is the action for dilapidations of the houses or buildings on a benefice; and it is brought by the new incumbent against the executors or administrators of his predecessor. This action cannot be said to be an exception to the rule *actio personalis moritur cum personâ*, for the deceased is not liable during his lifetime; the plaintiff must be the succeeding incumbent; and an action cannot be said to die which never had or could have any existence (*p*). However in the case of resignation or exchange, the preceding incumbent is himself liable for dilapidations (*q*). In estimating the damages to be recovered in this action, the rule is as follows:—The incumbent is bound to maintain the parsonage and chancel in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and he is not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong (*r*). And no damages can be recovered on account of neglect to cultivate the glebe lands in a husbandlike manner (*s*).

(*p*) *Sollers v. Lawrence*, Willes, 421.

(*q*) *Downes v. Craig*, 9 Mee. & Wels. 166.

(*r*) *Wise v. Metcalf*, 10 Barn. & Cress. 299.

(*s*) *Bird v. Relph*, 4 Barn. & Adol. 826.

CHAPTER II.

OF CONTRACTS.

PERSONAL actions, we have observed (*a*), may be brought not only on account of the infliction of a wrong, but also to recover pecuniary damages for the nonperformance of a contract, or to procure the payment of money due, if the payment of a specific sum be the subject of the contract. As the payment of money is the law's ultimate remedy in personal actions, an action for a given debt will be effectually satisfied by a judgment that the plaintiff do recover his debt; and this is the judgment accordingly given in an action of debt, which lies for the recovery of a specific sum due from the defendant to the plaintiff (*b*). But when no specific sum is claimed, the action can only, in the law phrase, *sound in damages*; and the amount of the damages to be recovered must be assessed by a jury according to the injury sustained (*c*). *or where the damages are matter of calculation they are awarded by the jury*

Action of debt.

Actions which sound in damages.

Liquidated damages.

It is, however, competent to the parties to a contract to agree between themselves, that, in the event of a breach by either party of any particular article in the contract, a given sum shall be recovered from him by the other as stipulated or liquidated damages; and in this case the whole of the sum thus agreed on may, on a breach of the contract, be recovered from the defaulter (*d*). But where a sum of money is stipulated to be recovered as liquidated damages in case of the breach of an agreement to do several acts, and such sum will, in case of breaches of the agreement, be in some instances

(*a*) *Ante*, p. 4.

(*b*) Stephen on Pleading, 116.

(*c*) *Ibid.* p. 117.

(*d*) *Reilly v. Jones*, 1 Bing.

302; S. C. 8 Moore, 214; Sugd.

Vend. & Pur. 221; *Leighton v.*

Wales, 3 Me. & Wels. 545; *Price*

v. Green, 15 M. & W. 346, 351.

too large and in others too small a compensation for the injury occasioned, such sum will not be allowed to be recovered in case of any breach, but damages only, proportioned to the actual injury which the breach has occasioned (*e*). In such a case, if the parties wish to bind themselves to pay liquidated damages, they must contract in clear and express terms, that for the breach of each and every stipulation contained in the agreement, a sum certain is to be paid; and in that case, although the stipulations may be of various degrees of importance, the parties will be held to their contract (*f*).

So much then for the legal remedies for a breach of contract. Let us now inquire more particularly of what a contract itself consists. A contract then, as defined by Blackstone (*g*), is “an agreement upon sufficient consideration to do or not to do a particular thing.”

Definition of a contract.

This agreement may be either express or implied; for the law always implies a promise to do that which a person is legally liable to perform, and the action of *assumpsit* on promises is constantly maintained for damages for the breach of such an implied contract (*h*).

Implied promise.

Thus a person who takes the goods of a tradesman is liable in *assumpsit* for their market value; for, as he took the goods, the law will imply for him a promise to pay for them. So a person who employs another to work for him impliedly contracts to give him reasonable remuneration; and a man who borrows money impliedly promises to repay it. And in all these cases the plaintiff in his declaration plainly states, that the defendant promised the plaintiff to pay him the money on request, yet the defendant, he continues, hath dis-

Assumpsit.

(*e*) *Kemble v. Farren*, 6 Bing. 141; S. C. 3 Moo. & Pay. 425;

(*f*) *Per Parke, B.*, 9 Mee. & Wels. 680.

Davies v. Penton, 6 Bar. & Cress. 216, 223; S. C. 9 Dowl. & Ry.

(*g*) 2 Bla. Com. 442.

369; *Horner v. Flintoff*, 9 Mee. & Wels. 678, 681.

(*h*) *Stephen on Pleading*, 18.

regarded his promise, and hath not paid any of the said monies or any part thereof (*i*); the promise all the while existing in contemplation of law only.

Parol or simple contracts.

Consideration necessary.

Consideration executed.

Express contracts are either by parol, or word of mouth, which are called *simple contracts*, or by deed under seal, which are called *special contracts* (*j*); although simple contracts may, and often must at the present day, be evidenced by writing. Let us consider first mere parol or simple contracts. A parol contract then is an agreement by word of mouth, upon sufficient consideration, to do or not to do a particular thing. According to the law of England a *consideration* is an essential ingredient in every contract: a promise without a consideration is regarded as *nudum pactum*, and no recompense can be recovered for its breach (*k*), neither will its performance be enforced in a court of equity (*l*). Thus if a man promise to give me 100*l.* without any consideration, he is not bound to perform his promise, and I am without remedy if he should break his word. So even if I should have done him any service, his subsequent promise to pay me money or otherwise benefit me, for a consideration already executed on my part, will not be binding, unless I should have done him the service at his request, in which case the promise will relate back to the request (*m*), or unless a request can be implied from a subsequent allowance of the service, or from other circumstances (*n*); and if the service rendered be of such a nature that the law will imply a

(*i*) Stephen on Pleading, 43.

(*j*) *Rann v. Hughes*, 7 T. R. 351, n.

(*k*) Doctor & Student, dial. 2, c. 24; 2 Bla. Com. 445.

(*l*) 1 Fonb. Eq. 335, *et seq.*

(*m*) *Hunt v. Bate*, Dyer, 272 a; *Lampleigh v. Brathwaite*, Hob. 105; 1 Smith's Leading Cases, 67;

Pawle v. Gunn, 4 N. C. 445, 448; *Eastwood v. Kenyon*, 11 Ad. & Ell. 438, 451; S. C. 3 Per. & Dav.

282; 1 Wms. Saund. 264, n. (1).

(*n*) The maxim is *omnis rati-habitio retrotrahitur et mandato æquiparatur*. — 1 Wms. Saund. 264 b, n. (c).

promise in respect of it, any subsequent express promise different from that which the law will imply will be void, as *nudum pactum* (o). And if the service, or any part of it, has been illegal from being contrary to the common law or to any statute, such illegal consideration will not support a promise. Thus a promise made in consideration that the other party had published a libel at the request of the person making the promise, and had also at the like request incurred certain costs, was held void on account of the illegality of part of the consideration, namely, publishing the libel, which vitiated the whole (p). And in like manner the circumstance of a woman's having cohabited with a man is not a valid consideration to support a promise made by him to pay her a sum of money (q).

Illegal consideration executed.

Considerations are divided in law into two classes, *good* (sometimes called meritorious) and *valuable*. A good consideration is that of *blood*, or the natural love and affection which a person has to his children or any of his relatives (r). A valuable consideration may be either pecuniary, namely, the payment of money; or the gift or conveyance of anything valuable; or it may be the consideration of the marriage of the party himself or of any relative; or any act of one party from which the other, or any stranger at his request, express or implied, derives any advantage; or any labour, detriment, inconvenience or risk sustained by the one party, if such labour be performed, or such detriment, inconvenience or risk be suffered by the one party at the request, express or implied, of the other, although such other may

Considerations good or valuable.

Good.

Valuable.

(o) *Hopkins v. Logan*, 5 Mee. & Ald. 650, 652. See however & Wels. 241, 247. *Gibson v. Dickie*, 3 Mau. & Sel.

(p) *Shackell v. Rosier*, 2 Bing. 463.

N. C. 634, 644. (r) 2 Black. Com. 297, 444.

(q) *Binnington v. Wallis*, 4 B.

A *good* consideration insufficient to support a promise.

himself derive no actual benefit (s). A good consideration is not of itself sufficient to support a promise, any more than the moral obligation which arises from a man's passing his word; neither will the two together make a binding contract; thus a promise by a father to make a gift to his child will not be enforced against him (t). The consideration of natural love and affection is indeed good for so little in law, that it is not easy to see why it should be called a *good* consideration; for in law it is considered as not good against creditors within the statute 13 Elizabeth (u), in which the very phrase *good consideration* is used; it is not good to support a contract; and a gift for such consideration is regarded as simply voluntary (x). The only reason why such a consideration should be called *good*, appears to be, that in early times, previously to the passing of the Statute of Uses (y), the Court of Chancery enforced a covenant to stand seised of lands to the use of any person of the blood of the covenantor, on account of the goodness of the consideration; whence it has happened that, since that statute, the legal estate (being by that statute annexed to the use (z)) will pass to a relative under a covenant to stand seised to his use (a). But the rules that anciently governed the Court of Chancery do not now regulate its proceedings (b); although modern equity will still interfere in favour of a wife or child in some cases in which it will not interpose on behalf of strangers (c).

(s) Selwyn's *Nisi Prius*, tit. Assumpsit, 46; 1 Wms. Saund. 211 d, n. (2); 2 Wms. Saund. 137 h, n. (c).

(t) *Jeffery v. Jeffery*, 1 Craig & Ph. 138; *Dillon v. Coppin*, 4 My. & Cr. 647; *Holloway v. Headington*, 8 Sim. 324; *Meek v. Kettlewell*, 1 Hare, 461; 1 Phil. 342. See however *Ellis v.*

Nimmo, Lloyd & Goold, 333.

(u) *Twyne's case*, 3 Rep. 80 b; *ante*, p. 43.

(x) 2 Black. Com. 297.

(y) 27 Hen. VIII. c. 10.

(z) Principles of the Law of Real Property, 121, *et seq.*

(a) *Ibid.* p. 149.

(b) *Ibid.* p. 126.

(c) *Ibid.* p. 234.

A valuable consideration is therefore in all cases necessary to form a valid contract. It has indeed been thought that an express promise, founded on a moral obligation, is sufficient for this purpose (*d*). This however appears to be a mistake. An express promise can give no original right of action, if the obligation on which it is founded could never have been itself enforced (*e*). But in some cases a valuable consideration, which might have formed a contract by means of an implied promise, had its operation not been suspended by some positive rule of law, may be revived and made available by a subsequent express promise. Thus a debt barred by the debtor's having become bankrupt and obtained his certificate may be enforced against him, if, after his ~~bankruptcy~~ ^{certificate}, he expressly promise to pay it (*f*); although such a promise must now, by the modern bankrupt acts (*g*), be made in writing signed by the bankrupt, or by some person thereto lawfully authorized by him in writing. So a simple contract debt, which would otherwise have been barred by the Statute of Limitations (*h*), from having been incurred upwards of six years, may be revived by a subsequent promise to pay, or even by an acknowledgment of the debt (*i*); but by a modern statute (*j*), such promise or

Valuable consideration necessary to a contract.

Express promise founded on moral obligation insufficient.

Debt barred by bankruptcy, how revived

Debt barred by the Statute of Limitations.

(*d*) *Lee v. Muggeridge*, 5 Taunt. 36. This case may now be considered as virtually overruled by subsequent authorities mentioned in the next note.

(*e*) Note to *Wrennall v. Adney*, 3 Bos. & Pull. 252; *Littfield v. Shee*, 2 Barn. & Adol. 811; *Meyer v. Haworth*, 8 Adol. & Ellis, 467; S. C. 3 Nev. & Per. 462; *Monkman v. Shepherdson*, 11 Adol. & Ell. 411, 415; S. C. 3 Per. & Dav. 182; *Jennings v. Brown*, per Parke, B., 9 Mee. & Wels. 501; *Eastwood v. Kenyon*,

11 Adol. & Ell. 447; S. C. 3 Per. & D. 276; 2 Wms. Saund. 137 f, n. (*e*).

(*f*) *Trucman v. Fenton*, Cowper, 544; *Kirkpatrick v. Tattersall*, 13 Mee. & Wels. 766. The promise may be before or after the certificate.

(*g*) 6 Geo. IV. c. 16, s. 131; 5 & 6 Vict. c. 122, s. 43.

(*h*) Stat. 21 Jac. I. c. 16, s. 3.

(*i*) Bac. Abr. tit. Limitations of Actions (E).

(*j*) Stat. 9 Geo. IV. c. 14, s. 1, called Lord Tenterden's Act.

Debt incurred
during infancy.

acknowledgment must be made or contained by or in some writing, to be signed by the party chargeable thereby. And in like manner a debt incurred or contract made by a person during infancy, and voidable on that account, may be confirmed by an express promise or ratification made when of full age (*k*); although such a promise or ratification must now, by the statute just mentioned (*l*), be made by some writing signed by the party to be charged therewith.

*debt by writing
contract
not by deed*

Contracts which
are required to
be in writing.

Statute of
Frauds, s. 4.

By the ancient common law, every legal instrument in writing was a deed sealed and delivered (*m*); and in accordance with this circumstance, contracts are as we have seen (*n*) now divided in law into two kinds only, namely, ~~parol~~ (that is verbal) ~~or~~ simple contracts, and special contracts made by deed. But as the art of writing became general, many parol contracts were, for greater certainty, put into writing, though not made by deed. And by some statutes of modern times, writing is required to most simple contracts respecting matters of importance. These statutes we shall now proceed to notice, premising that in all cases where writing is by any statute made necessary to a contract, the contract is still a *parol* one, though evidenced by the writing (*o*); but when a contract is made by deed, the *deed itself* is the contract (*p*). The first and most important statute then, by which writing is required to many agreements, is the Statute of Frauds (*q*), which enacts in its fourth section, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special

(*k*) Bac. Abr. tit. Infancy and Age (I) 8; *Williams v. Moor*, 11 Mee. & Wels. 256, 263.

(*l*) Stat. 9 Geo. IV. c. 14, s. 5.

(*m*) See Principles of the Law of Real Property, 114.

(*n*) *Ante*, p. 62.

(*o*) Sugd. Vend. & Pur. 125, 126.

(*p*) Dyer, 305 a; *Byron v. Byron*, Cro. Eliz. 472; 1 Wms. Saund. 274 a, n. (3).

(*q*) 29 Car. II. c. 3.

promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This enactment, it will be observed, does not give to writing any validity which it did not possess before. A written promise made since this statute, without any consideration, is quite as much *nudum pactum* as it would have been before (r). The statute merely adds a further requisite to the validity of certain contracts, namely, that they shall, besides being good in other respects, be put into writing, otherwise no action shall be maintained upon them.

A great number of cases have been decided upon the above section of this celebrated statute. One of the most important is that of *Wain v. Warlters* (s), in which it was held that the statute, in requiring the *agreement* to be in writing, required that the *consideration*, which is part of the agreement, should be in writing, as well as the promise itself. And therefore a promise in writing to pay the debt of a third person, which did not state any consideration, was held to give no cause of action; and parol evidence of a consideration was not allowed to be given. This case has been followed by many other decisions to the same effect (t). If however the

*Wain v.
Warlters.*

The consideration must be in writing.

(r) See Williams on Executors, pt. 4, bk. 2, ch. 2, sect. 2; 1 Wms. Saund. 211, n. (2).

ing Cases, 147.

(t) *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Morley v. Boothby*, 3 Bing. 107; *Clancy v.*

consideration for the promise, though not expressly stated, can be fairly gathered from the terms of the writing, that will be sufficient (*u*). The phrase in the statute to *answer for* the debt, default, or miscarriage of another person, means to answer for a debt, default, or miscarriage *for which that other remains liable* (*v*). Thus where one party to an agreement verbally promised the other, that, in consideration of his discharging from custody a third person whom he had taken in execution for debt, he, the first party, would pay the debt, it was held that an action might well be brought on this promise, although it was not put in writing (*w*). For this was not a promise to answer for the debt of another person, to which that other remained liable, but to pay a debt from which the other was discharged. It was an original promise to pay, and not a collateral promise to guarantee, which is the meaning in the statute of the word "answer for." The words "any agreement that is not to be performed within the space of one year from the making thereof," have been held to mean an agreement which appears from its terms incapable of performance within the year. Thus where one man promised another, for one guinea, to give him a certain number on the day of his marriage, it was held that a writing was unnecessary, for the marriage might have happened within the year (*x*). So a contract by A. that his executor shall pay 10,000*l.* need not be in writing (*y*); for

Answering for
debt, default, or
miscarriage.

Space of one
year from the
making.

Piggott, 2 Ad. & Ell. 473; 1 & Ell. 453; S. C. 2 Per. & Dav. 430.

Smith's Leading Cases, 136; 1 Wms. Saund. 211, n. (*d*); *Price v. Richardson*, 15 Mec. & Wels. 539.

(*u*) *Newbury v. Armstrong*, 6 Bing. 201; *Shortrede v. Check*, 1 Ad. & Ell. 57.

(*v*) 1 Wms. Saund. 211 b, n. (2); 1 Smith's Leading Cases, 134; *Green v. Cresswell*, 10 Ad.

(*w*) *Goodman v. Chase*, 1 Barn. & Ald. 297. See also *Lane v. Burghart*, 1 Q. B. 933.

(*x*) *Peter v. Compton*, Skin. 353; 1 Smith's Leading Cases, 142; *Souch v. Strawbridge*, 2 C. B. 808.

(*y*) *Wells v. Horton*, 4 Bing. 40.

the death of A. and payment of the money may all take place within a twelvemonth. It has also been held that, in order to bring an agreement within this clause of the statute, so as to render writing necessary, both parts of the agreement must be such as are not to be performed within a year from the making thereof. Thus, where a landlord agreed to lay out 50*l.* in improvements, in consideration of the tenant undertaking to pay him 5*l.* a year during the remainder of his term, (of which several years were unexpired,) it was held that writing was unnecessary (*z*); for although the tenant's part of the agreement was not to be performed within a year, the landlord's part might reasonably have been so. These decisions have considerably narrowed the operation of the statute, and have left remaining much of the mischief arising from reliance on memory only, which it was the intention of the statute to obviate, by requiring written evidence (*a*). The last clause of the enactment has however received a very liberal construction. The words are "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And it has been held that any insertion by the party of his name in any part of the agreement is a sufficient signing within the statute (*b*), provided the name be inserted in such a manner as to have the effect of authenticating the instrument (*c*); and it is not necessary that both parties should sign the agreement. The whole of the agreement must be contained in the writing, either expressly or by reference to some other document, but the writing is required by the statute to be signed only by the party to be charged (*d*). And as a "memo-

Signed by the party to be charged.

Memorandum or note.

(*z*) *Donellan v. Reid*, 3 Barn. 219; *Selby v. Selby*, 3 Meriv. & Adol. 899. 4, 6.

(*a*) See 1 Smith's Leading Cases, 144, *et seq.* (*d*) *Laythorp v. Bryant*, 2 Bing. N. C. 735, 742. See Sugd.

(*b*) *Ogilvie v. Foljambe*, 3 Meriv. 62. Vend. & Pur. c. 3, ss. 3, 4, p. 112, *et seq.* 11th edit.

(*c*) *Stokes v. Moor*, 1 Cox,

randum or note" of the agreement is allowed, a writing sufficient to satisfy the statute may often be made out from letters written by the party (*e*), or from a written offer, accepted, without any variation (*f*), before the party offering has exercised his right of retracting (*g*).

Sale of goods
for 10*l.* or
upwards.

The seventeenth section of the Statute of Frauds, which relates to contracts for the sale of goods, wares and merchandize for the price of 10*l.* or upwards, has been already noticed (*h*), together with the clause in the statute of Geo. IV., called Lord Tenterden's Act, by which this enactment has been extended and explained (*i*). We have also incidentally noticed the provision of the modern Bankrupt Acts (*j*), by which it is provided that no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim or demand, from which he shall have been discharged by virtue of such certificate, upon any promise made after the suing out of the fiat in bankruptcy, unless such promise be made in writing signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.

Bankrupt's
promise to pay
debt barred by
certificate.

Lord Tenter-
den's Act.

The next statute which requires our notice is intituled "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements," and is commonly called Lord Tenterden's Act (*k*). By this statute no acknowledgment or promise by words only can take any case of simple contract out of the operation of the Statute of Limitations (*l*),

Written ac-
knowledge-
ment
required to take
the case out of
the Statute of
Limitations.

(*e*) *Owen v. Thomas*, 3 My. & Keen, 353.

(*f*) *Holland v. Eyre*, 2 Sim. & Stu. 191.

(*g*) *Routledge v. Grant*, 4 Bing. 653; S. C. 1 Moo. & Pay. 717.

(*h*) *Ante*, p. 36.

(*i*) Stat. 9 Geo. IV. c. 14, s.

7; *ante*, p. 37.

(*j*) Stat. 6 Geo. IV. c. 16, s. 131; 5 & 6 Vict. c. 122, s. 43; *ante*, p. 65; see *post*, the chapter on Bankruptcy.

(*k*) Stat. 9 Geo. IV. c. 14.

(*l*) Stat. 21 Jac. I. c. 16, s. 3.

or deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby (*m*). The effect of such a promise has already been referred to (*n*). The statute makes no mention of any signature by an agent; such a signature therefore is not in this case sufficient (*o*). And no joint contractor is to lose the benefit of the Statute of Limitations by reason only of any written acknowledgment or promise made and signed by any other joint contractor; but nothing therein contained is to alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever (*p*). However, no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the Statute of Limitations (*q*). The statute further enacts (*r*), as has been already mentioned (*s*), that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. And it is further enacted (*t*), that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade

Promise to pay debts contracted in infancy.

Representations of character, &c.

(*m*) See *Lechmere v. Fletcher*, N. C. 776.

1 Cro. & Mee. 623; *Bird v. Gammon*, 3 Bing. N. C. 883; *Cheslyn v. Dalby*, 4 You. & Coll. 238.

(*n*) *Ante*, p. 65.

(*o*) *Hyde v. Johnson*, 2 Bing.

(*p*) Stat. 9 Geo. IV. c. 14, s. 1.

(*q*) Sect. 3.

(*r*) Sect. 5.

(*s*) *Ante*, p. 66.

(*t*) Sect. 6.

or dealings of any other person, to the intent or purpose that such other person may obtain *credit, money or goods upon*, unless such representation or assurance be made in writing signed by the party to be charged therewith. There appears to be some error in the word "*upon*" in this enactment, which, as it stands, is superfluous (*u*). And it has been doubted whether a representation made to a purchaser by the trustee of some property, that the property was encumbered to a less extent than was actually the case, was a representation concerning the *ability* of the vendor within the meaning of the statute (*x*). The better opinion seems to be that such a representation is within the statute, and ought consequently to be obtained in writing.

Bills and notes.

In addition to those contracts which by statute are required to be in writing, there exists a peculiar class of contracts, which in their nature are expressed in writing, and for which a consideration is presumed to have been given till the contrary is proved (*y*). These are bills of exchange and promissory notes (*z*). A bill of exchange is a written order from one person to another to pay to a third person, or to his order, or to the bearer, a certain sum of money. The person making the order is called the drawer, the person on whom it is made the drawee, and the person to whom the money is payable the payee. The bill is sometimes made payable to the drawer himself, or to his order, or to him or bearer. If the person on whom the bill is drawn undertakes to pay it, he writes on it the word "accepted," with his signature, and is then called the acceptor. A promissory note, or note of hand, as it is sometimes called, is

A bill of exchange.

A promissory note.

(*u*) See 1 Mee. & Wels. 104, 123.

(*y*) See *Mills v. Barber*, 1 Mee. & Wels. 425.

(*x*) See *Lyde v. Barnard*, 1 Mee. & Wels. 101; *Swann v. Phillips*, 8 Ad. & Ell. 457.

(*z*) See Byles on Bills, and Bayley on Bills.

a written promise from one person to pay to another, or to his order, or to bearer, a certain sum of money. The person making the promise is called the maker of the note. No negotiable or transferable bill or note can be lawfully drawn or made for any sum under 20*s.* (a); and bills and notes under 5*l.* cannot be made payable to bearer on demand, and are subject to other stringent restrictions (b). Bills and notes payable to bearer on demand are also prohibited from being issued by bankers, except by the banks and under the restrictions mentioned in the act recently passed to regulate the issue of bank notes (c). Bills or notes payable to A. B. or order are transferable by a written order indorsed thereon by A. B. The mere signature by A. B. of his name on the back is however sufficient for this purpose. This is called an indorsement in blank; and after such an indorsement, the bill or note, together with the right to sue upon it, may be transferred by mere delivery (d). Any holder of the bill may consequently, after such an indorsement, enforce payment to himself. The indorsement may however be special, as "Pay C. D. or order. A. B." And in this case the bill or note, in order to become transferable, must be indorsed by C. D. But if a bill be once indorsed in blank, it will always be payable to the bearer by any of the parties thereto, although it may subsequently be specially indorsed; but the special indorser will not be liable to the bearer without the indorsement of the person to whom he has specially indorsed it (e). A bill or note payable to bearer is transferable by mere delivery without any indorsement.

Prohibited bills
and notes.

Indorsement in
blank.

Special indorse-
ment.

(a) Stat. 48 Geo. III. c. 88, 10, 11.

s. 2.

(d) *Peacock v. Rhodes*, 2 Doug.

(b) Stat. 17 Geo. III. c. 30; 7 333.

Geo. IV. c. 6, s. 4.

(e) *Smith v. Clarke*, Peake,

(c) Stat. 7 & 8 Vict. c. 32, ss. 225.

Liability of
acceptor;

of drawer.

Protest.

Liability of
indorser.

Bonâ fide holder
may enforce
payment.

The effect of accepting a bill, or making a promissory note, is to render the acceptor or maker primarily liable to pay the same to the person entitled to require payment. The effect of drawing a bill is to make the drawer liable to payment, if the acceptor make default. But in order to charge the drawer of a foreign bill, it must, by the custom of merchants, be protested by a notary public (*f*). This protest is a declaration by him in due form that payment has been demanded and refused. A protest, however, is unnecessary for an inland bill or promissory note (*g*). The effect of indorsing a bill or note is to make the indorser also liable to payment, if the acceptor of the bill or maker of the note should make default. The indorsement operates as against the indorser as a new drawing of the bill by him (*h*). An indorsement however may be made without recourse to the indorser, or “sans recours,” as it is generally expressed, in which case the indorser avoids all personal liability (*i*). The drawer of a bill, or the indorser of a bill or note, will, however, be discharged from all liability, unless the person requiring payment should, within a reasonable time, give him notice that the bill or note has not been paid, or, as it is termed, has been dishonoured, and give him to understand, either expressly or by implication, that he looks to him for payment (*k*). In consequence of a consideration being presumed to have been given for every bill or note till the contrary is shown, it follows, that if a bill or note should have been drawn, accepted, or indorsed without any consideration, or for a consideration which is illegal, a bonâ fide holder for valuable consideration, or any indorsee from him, may, nevertheless, enforce payment;

(*f*) *Gale v. Walsh*, 5 T. Rep. 239. Mee. & Rosc. 441.

(*i*) Byles on Bills, 110.

(*g*) *Windle v. Andrews*, 2 Barn & Ald. 696.

(*k*) *Hartley v. Case*, 4 Barn. & Cress. 339; Byles on Bills, 202,

(*h*) *Penny v. Innes*, 1 Cro. *et seq.*

for when he took the security he was entitled to rely on the legal presumption of a proper consideration having been given(*l*). It is stated by Sir William Blackstone(*m*), “that every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration.” This, however, appears to be a mistake. The law does not give this effect to bills of exchange and promissory notes in respect of the undertaking being evidenced by writing, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities(*n*). On this ground the law allows these instruments to form an exception to the general rule, that a consideration must be shown for every agreement, although evidenced by writing.

Reason why a consideration is presumed.

We now come to the second class of contracts, namely, special contracts, or contracts by deed. These contracts differ from mere simple contracts in the following important particular, that they of themselves import a consideration(*o*), whilst in simple contracts a consideration must be proved. For the law presumes that no man will put his seal to a deed without some good motive(*p*). And when an agreement is once embodied in a deed, such deed becomes itself the agreement, and not evidence merely, as is the case when a parol agreement is reduced to writing. On this principle it appears to be that, after a deed has been executed, any alteration, rasure or addition made in a material point, even by a stranger, will render the deed void; and any alteration made by the party to whom it is delivered, although in words not material, will also render it

Contracts by deed.

Alteration, rasure, &c.

(*l*) *Collins v. Martin*, 1 Bos. & Pull. 651; *Morris v. Lee*, Bayley on Bills, 500; *Robinson v. Reynolds*, 2 Q. B. 196; *May v. Chapman*, 16 M. & W. 355.

(*m*) 2 Black. Comm. 416.

(*n*) 1 Fonbl. Eq. 343, 344.

(*o*) 1 Fonbl. Eq. 342.

(*p*) See Principles of the Law of Real Property, 114.

void (q). It is true that by a recent decision (r) this doctrine has been extended to a mere written agreement. But although it is no doubt highly important that all legal instruments should be preserved in their integrity, it may perhaps be doubted whether the doctrine in question would ever have existed, had there been no other reason for it than the duty of a person having the custody of an instrument, made for his benefit, to preserve it in its original state.

Objects of a contract, lawful or unlawful.

Having now spoken of the promise, whether express or implied, which is necessary to a contract, and also of the consideration, whether express or implied, by which such promise is sustained, let us consider some important *objects* for which a contract may be made, and which seem to require a special mention. The object for which a contract is made may be either lawful or unlawful; and if it be unlawful the contract will be void, and the illegality may be pleaded as a defence to an action brought upon such a contract (s). A distinction was formerly taken between contracts whose object was merely prohibited by the law under some given penalty, and those whose object was morally wrong. The former were termed *mala prohibita*, the latter *mala in se* (t); and it was considered that, as the former involved no moral turpitude, a man might embrace either of the alternatives offered by the law, and either abstain from the offence and remain harmless, or commit it and suffer the penalty. This distinction however has long been exploded (u); for it is considered to be equally unfit

Mala prohibita and mala in se.

Distinction now exploded.

(q) <i>Pigot's case</i> , 11 Rep. 27 a.	9 East, 416, n.; <i>De Begnis v. Armistead</i> , 10 Bing. 107; S. C. 3 Moo. & Scott, 516.
(r) <i>Davidson v. Cooper</i> , 13 Mee. & Wels. 343, 352.	
(s) <i>Collins v. Blantern</i> , 2 Wils. 341, 347; S. C. 1 Smith's Leading Cases, 154; <i>Paxton v. Popham</i> , 9 East, 408; <i>Pole v. Harrobin</i> ,	(t) See 1 Black. Comm. 54, 57.
	(u) <i>Aubert v. Maze</i> , 2 Bos. & Pul. 374, 375; <i>Cannan v. Bryce</i> , 3 B. & Ald. 183; <i>Bensley v. Big-</i>

that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state. Whether, therefore, the object of a contract be unlawful because morally wrong, or unlawful by the policy of the common law, or unlawful because a penalty is attached to it by any particular statute, in every case the contract is void; and it is indifferent, under such circumstances, whether the contract be made by deed, or by parol merely. Thus if a bond under seal be given by a man to a woman in order to induce her to cohabit with him, it is void for the immorality of its object (*x*). But a bond given to a woman in respect of the injury she has sustained by past cohabitation is valid (*y*). For in this case the object is not immoral; and the consideration implied by the bond being a deed under seal, supplies the want which would otherwise exist of a proper consideration (*z*). If a contract have more than one object, and some of the objects are lawful whilst the others are unlawful, the unlawful objects will not vitiate the others (*a*), provided the good part be separable from, and not dependent upon, that which is

Contract with unlawful object void.

Bond to induce cohabitation void.

But bond for past cohabitation good.

If some objects be lawful and others unlawful.

nold, 5 Barn. & Ald. 335, 341; *Cope v. Rowlands*, 2 Mee. & Wels. 149, 157; *Fergusson v. Norman*, 5 Bing. N. C. 76, 84.

(*x*) *Walker v. Perkins*, 1 Wm. Black. 517; S. C. 3 Burr. 1568; *Gray v. Mathias*, 5 Ves. 286.

(*y*) *Turner v. Vaughan*, 2 Wils. 339; *Hilly v. Spencer*, 2 Amb. 641; *Gray v. Mathias*, 5 Ves. 286; *Hall v. Palmer*, 3 Hare, 532; *Kyne v. Moore*, 1 Sim. & Stu. 61; 2 Sim. & Stu. 260; *Inge v. Moseley*, 6 Barn. & Cress. 133; 2 Sim. 161.

(*z*) *Bennington v. Wallis*, 4

Barn. & Ald. 650, 652; *ante*, p. 63.

(*a*) *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440; in all which decisions unlawful covenants to pay the property tax were held not to vitiate other valid covenants in the same instrument. See also *Kerrison v. Cole*, 8 East, 231; *Mullan v. May*, 11 Mee. & Wels. 653; *Green v. Price*, 13 Mee. & Wels. 695, affirmed, 15 Mee. & W. 316.

bad (*b*) ; unless of course the whole contract should be rendered void by any enactment to the effect that all instruments containing any matter contrary thereto shall be void, in which case everything connected with the instrument will be vitiated (*c*). And if the good part of a contract be inseparable from the bad, as if a contract be made partly in consideration of the payment of money (which would be good), and partly for a consideration whose object is illegal, the illegal part of the consideration will vitiate the good, and render the whole contract void (*d*).

The instance above given of a bond for future cohabitation is an example of a contract void on account of its object being *malum in se*, or morally wrong. In the same manner, no action can be maintained on any contract for the sale or publication of any libellous or immoral book or print (*e*). A striking instance of a contract void on account of its object being contrary to the policy of the common law, occurs in the case of a contract in restraint of trade. It is for the advantage of the community that every person should be allowed the full exercise of his trade or profession ; and any contract whereby a person is attempted to be restrained from following his usual calling, even for a limited time, is therefore absolutely void (*f*). But a contract is not rendered void by having for its object the restraint of a person from trading in a particular

Immoral publication.

Contracts in restraint of trade.

(*b*) See *Biddell v. Leeder*, 1 Barn. & Cress. 327, decided on the old Ship Registry Act.

(*c*) See 1 Smith's Leading Cases, 169, and the statutes recited in the preamble to 5 & 6 Will. IV. c. 41.

(*d*) *Fetherston v. Hutchinson*, Cro. Eliz. 199 ; *Bridge v. Cage*, Cro. Jac. 103. See also per Tindal, C. J., in *Waite v. Jones*, 1

Bing. N. C. 662.

(*e*) *Fores v. Johnes*, 4 Esp. 97 ; *Stockdale v. Onwhyn*, 5 Barn. & Cress. 173 ; S. C. 7 Dow. & Ry. 625 ; *Lawrence v. Smith*, Jac. 471.

(*f*) Year-Book, P. 2 Hen. V. pl. 26 ; *Ward v. Byrne*, 5 Mee. & Wels. 518 ; *Hind v. Gray*, 1 Man. & Gran. 195.

place(*g*), or within a reasonable distance from any particular place(*h*), for he may carry on his trade elsewhere; nor is a contract void which restrains a person from serving a particular class of customers(*i*) (for there are plenty of others to be found), or which binds a person to be the servant for life in his trade to another(*k*), for this is not in restraint of trade when it is to be carried on for his life. In a recent case(*l*) a person agreed that he would become assistant to a dentist for four years, and that after the expiration of that term he would not carry on the business of a dentist in London, or in any of the towns or places in England or Scotland where the dentist might have been practising before the expiration of the service. And it was held that the covenant not to practise in London was valid; but that the stipulation as to the other towns and places in England or Scotland was void. And according to the rule above mentioned(*m*), that where some of the objects of a contract are lawful and others unlawful, the unlawful objects will not vitiate the others, it was held that the stipulation as to practising in London was not affected by the illegality of the remainder of the agreement.

The cases in which contracts may be void in consequence of their contravening some acts of parliament are too numerous to be here specified. As an instance may be mentioned contracts by clergymen holding benefices with cure of souls, made for the purpose of

Charges on
benefices.

(*g*) *Hitchcock v. Coker*, 6 Ad. 383.

& Ell. 438; S. C. 1 Nev. & P. 796; *Archer v. Marsh*, 6 Ad. & Ell. 959; S. C. 2 Nev. & P. 562; *Leighton v. Wales*, 3 Mee. & Wels. 545.

(*h*) *Davis v. Mason*, 5 T. Rep. 118; *Proctor v. Sergeant*, 2 Man. & Gr. 20; S. C. 2 Scott, N. R. 289; *Whittaker v. Howe*, 3 Beav.

(*i*) *Rannie v. Irvine*, 7 Man. & Gr. 969.

(*k*) *Wallis v. Day*, 2 Mee. & Wels. 273.

(*l*) *Mullan v. May*, 11 Mee. & Wels. 653. See also *Green v. Price*, 13 Mee. & Wels. 695, affirmed, 15 Mee. & Wels. 316.

(*m*) *Aut*, p. 77.

charging such benefices with any sum of money; which contracts are rendered void by a statute of Elizabeth(*n*). And in these cases it has been held that any personal covenant for the payment of the money charged, is not invalidated by being contained in the same deed as the attempted charge on the benefice(*o*). Contracts for the sale or transfer of stock, of which the person contracting is not possessed at the time, and of which no transfer is intended to be made, are void by the Stock Jobbing Act(*p*); and money lent for the purpose of settling losses which have arisen from such illegal contracts cannot be recovered back(*q*). Securities for money won at play or any game, or by betting on any game, or for money lent for gaming or betting at the time and place of such play, were declared by a statute of Anne to be utterly void(*r*); but by a later statute(*s*) such securities are not to be utterly void, but are to be taken to have been given for an illegal consideration; they are consequently now void only as between the parties, but valid in the hands of any innocent holder, to whom they may have been transferred without notice of the illegality of the transaction in which they originated(*t*). And by a more recent statute(*u*) it is enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to

Stock Jobbing
Act.

Securities for
money won at
play.

Contracts by
way of gaming
or wagering
void.

(*n*) Stat. 13 Eliz. c. 20. See *Shaw v. Pritchard*, 10 Barn. & Cress. 241.

(*o*) *Monys v. Leake*, 8 T. Rep. 411; *Sloane v. Packman*, 11 Mee. & Wels. 770.

(*p*) Stat. 7 Geo. II. c. 8, s. 8. See *post*, the chapter on Stock.

(*q*) *Cannan v. Bryce*, 3 Barn. & Ald. 179.

(*r*) Stat. 9 Anne, c. 14.

(*s*) 5 & 6 Will. IV. c. 41.

(*t*) See *ante*, p. 74.

(*u*) Stat. 8 & 9 Vict. c. 109, s. 18.

abide the event on which any wager shall have been made. But this enactment is not to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise. Contracts for the payment of money, whereby there should be reserved more than five per cent. interest, were in like manner declared void by a statute of Anne, called the Usury Law (*x*); but in order to protect innocent holders of securities given for usurious consideration, it was subsequently declared that such contracts should not be absolutely void, but should be considered to have been made for an illegal consideration (*y*). However, by a recent statute (*z*), which has been continued to the 1st of January, 1851 (*x*), all bills of exchange and promissory notes made payable at or within twelve months after the date thereof, or not having more than twelve months to run, and all contracts for the loan or forbearance of money above the sum of 10*l.* sterling, are exempted from the operation of the Usury Law. Nothing therein contained, however, is to extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein.

Usurious contracts.

The above enactments are perhaps the most important statutory provisions by which contracts may be vitiated. Contracts whose objects are lawful are endlessly diversified, and many of them are regulated by laws which it is not within the scope of the present work to enumerate. For the breach of any such contract pecuniary damages are, as we have seen (*b*), the sovereign remedy prescribed

Contracts with lawful objects.

(*x*) Stat. 12 Anne, st. 2, ch. 16.

(*z*) 2 & 3 Vict. c. 37. See 1

(*y*) Stat. 5 & 6 Will. IV. c. 41.

Wms. Saund. 295 c. n. (*l*).

See *Vallance v. Siddel*, 6 Ad. & Ell. 932.

(*a*) Stat. 8 & 9 Vict. c. 102.

(*b*) *Ante*, p. 55.

by law ; though equity not unfrequently administers more appropriate specifics. The person to whom money has become due, whether from any injury received, or from any contract broken, or from a contract to pay money itself, stands in a situation more or less advantageous as regards his remedies for recovering the money, according to the nature of the *debt* which has thus become due to him. For by the law of England all creditors are not allowed equal rights, but are preferred the one to the other, partly according to accidental circumstances, and partly according to the degree of diligence and precaution which each may have used. The subject of debt is of sufficient importance to form a separate chapter.

Debts.

CHAPTER III.

OF DEBTS.

DEBTS, by the law of England, are divided into different classes, conferring on the creditor different degrees of security for re-payment. The class which confers the highest privileges is that of debts of record, which class will accordingly first claim our attention.

A debt of record is a debt due by the evidence of a court of record (*a*). Every court, by having power given to it to fine and imprison, is thereby made a court of record (*b*). Such courts are either supreme, superior or inferior. The supreme court is the Parliament. The superior courts of record are the House of Lords, the Court of Chancery, and the Courts of Queen's Bench, Common Pleas and Exchequer, which are the more principal courts. The Courts of the Counties Palatine of Lancaster and Durham are also superior courts of record (*c*). The Court of Bankruptcy (*d*) and its subdivision courts (*e*) seem also to fall within this class, as they exercise and enjoy all the powers and privileges of a court of record, as fully as the courts of law at Westminster. Every commissioner of the Court of Bankruptcy, when acting in the prosecution of any fiat of bankruptcy, forms a court of record (*f*), which appears to be an inferior court. The Court for the Relief of Insolvent Debtors appears also to be an inferior court of

Debt of record.

Superior courts of record.

Inferior courts of record.

(*a*) 2 Black. Com. 465.(*c*) Stat. 5 & 6 Will. IV. c. 29,(*b*) Bac. Abr. tit. Courts (D) 2. s. 25.(*c*) *Ibid.* (D) 1.(*f*) Stat. 5 & 6 Vict. c. 122,(*d*) Stat. 1 & 2 Will. IV. c. 56, s. 66.

s. 1.

record (*g*). But this court and the courts of bankruptcy have a jurisdiction limited to the special objects for which they were constituted. The inferior courts of record may therefore now be said, generally, to consist of the numerous courts established throughout the country, under the recent act, for the more easy recovery of small debts and demands in England (*h*). -

Crown debts.

Debts of record do not, however, confer the same advantages on all creditors equally, for there is one creditor whose claims are paramount to all others, namely, the crown, provided the debt be a debt of record, or a debt by specialty, that is, secured by deed (*i*). And if the debt be by simple contract without such security, it will have preference over the other simple contract creditors of the debtor, and, as some say, even over other creditors by specialty (*k*). The lien of the crown on the lands of its debtors by record or specialty, and also on the lands of accountants to the crown, is mentioned in the author's Treatise on the Principles of the Law of Real Property (*l*).

Judgment debt.

Of all debts which one subject may owe to another, that which confers the most important remedy is a *judgment debt*, or a debt which is due by the *judgment* of a court of record. As such a debt is due by the evidence of a court of record, it is of course a debt of record. Such a debt may however now be incurred, without any actual exercise of judgment on the part of the court. For, strange as it may appear, a judgment against a defendant in an adverse suit, though the most obvious, is yet not the most usual method of incurring a judgment debt. Such a debt may be incurred by the volun-

(*g*) Stat. 1 & 2 Vict. c. 110, s. 27. 3, bk. 2, ch. 2, s. 1.
 (*h*) Stat. 9 & 10 Vict. c. 95, s. 3. (*k*) Bac. Abr. tit. Executors (L) 2.
 (*i*) Williams on Executors, pt. (*l*) Page 52.

tary default of the defendant in making no reply to the action, which is called *nihil dicit*, or by his failing to instruct his attorney, whose statement of that circumstance is called *non sum informatus*, or by a *cognovit actionem*, or more shortly *cognovit*, by which the defendant confesses the action, and suffers judgment to be at once entered up against him (*m*). The most frequent method of incurring a judgment debt is not however attended with the actual commencement of any adverse action. A *warrant of attorney* is given by the intended debtor, which consists of an authority from him to certain attorneys to appear for him in court, and to receive a declaration in an action of debt for the amount of the intended judgment debt, at the suit of the intended creditor, and thereupon to confess the action, or suffer judgment to go by default, and to permit judgment to be forthwith entered up against the intended debtor for the amount, besides costs of suit. Such a warrant of attorney is generally executed as a security for a smaller sum of money, usually one-half of the amount of the judgment debt; and it is accordingly accompanied by a *defeazance*, which must be written on the same paper or parchment as the warrant of attorney (*n*). This defeazance, as its name imports, defeats the full operation of the warrant of attorney, by declaring that it is given only as a security for the

Cognovit.

Warrant of attorney.

Defeazance.

(*m*) 3 Black. Com. 397; Stephen on Pleading, 120.

(*n*) See Rule of Courts of Queen's Bench and Common Pleas, M. 42 Geo. III., 2 East, 136; 3 Bos. & Pul. 310; Rule of Court of Exchequer, M. 43 Geo. III., Manning's Exchequer Practice, Appendix, 225; *Barber v. Barber*, 3 Taunt. 465; stat. 3 Geo. IV. c. 39, s. 4; 1 & 2 Vict. c. 110, s. 60. Collateral securities must

be noticed, *Morrell v. Dubost*, 3 Taunt. 235. If the attorney neglect to insert the defeazance, the security is not void between the parties, but only as against the assignees of the debtor, in case of his bankruptcy or insolvency, *Shaw v. Evans*, 14 East, 576; *Morris v. Methin*, 6 Barn. & Cress. 446; *Bennett v. Daniel*, 10 Barn. & Cress. 500.

smaller sum and interest, and that no execution shall issue on the judgment to be entered up in pursuance of the warrant of attorney, until default shall have been made in payment of such sum and interest at the time agreed on; but that, in case of default, execution may be issued. The defeazance also generally contains an agreement that it shall not be necessary for the creditor to issue a writ of *scire facias*, or do any other act for reviving the judgment or keeping the same on foot, although no proceedings shall have been taken thereupon for the space of one year. Without such a provision, no execution could be issued after the expiration of a twelvemonth from the date of the judgment, without the expense and trouble of a writ of *scire facias*, calling on the debtor to inform the court, or show cause why execution should not be issued (o). A warrant of attorney is also sometimes given for entering up judgment for a sum of money, in order to secure the regular payment of an annuity; in which case the defeazance of course expresses that no execution shall be issued until default shall have been made for so many days in some payment of the annuity, but that, in case of such default, execution may be issued from time to time (p).

Execution and attestation of warrants of attorney and cognovits.

A warrant of attorney is a very simple means of incurring a very serious liability. It need not even be under seal (q), though it generally is so. In order to guard against any imposition in procuring debtors to execute warrants of attorney or *cognovits* in ignorance of the effect of such instruments, it is provided by a recent act (r) that no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall

(o) Stat. Westm. the second, 13 Edw. I. c. 45.

(q) *Kinnersley v. Mussen*, 5 Taunt. 264.

(p) See *Cuthbert v. Dobbin*, 1 C. B. 278.

(r) Stat. 1 & 2 Vict. c. 110, s. 9.

be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. And a warrant of attorney or cognovit not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (s). Unless, therefore, the act be strictly complied with, the warrant of attorney or cognovit will be invalid (t). *The atty need not be certificated.*

Not only was there a risk of debtors being imposed upon, in being prevailed on to execute warrants of attorney, but creditors also were formerly liable to be defrauded, by their debtors giving secret warrants of attorney to some favoured creditors, to the prejudice of the others. In order to obviate this inconvenience, provision has been made by a modern act of parliament for the filing, in the office of the Court of Queen's Bench, of all warrants of attorney, with the defeazances thereto, and of all cognovits, or of copies thereof, within twenty-one days after their execution (u). And, in the event of the bankruptcy or insolvency of the debtor after the expiration of this time, unless any such warrant of attorney or cognovit, or a copy thereof, shall have been filed *These will not need* within such time, or unless judgment shall have been *see Legal Chancery* signed (x) within such time, the warrant of attorney or *vol. 43. p. 10,*

(s) Sect. 10.

(t) *Potter v. Nicholson*, 8 Mee. & Wels. 494; *Exerard v. Poppleton*, 5 Q. B. 181.

(u) Stat. 3 Geo. IV. c. 39,

ss. 1, 3.

(x) The words of the act are, "unless judgment shall have been signed or execution issued," but these latter words have no mean-

*an agreement
in contemplation of bankruptcy
ver "*
2015 Vic c 106
36

cognovit, and the judgment and execution thereon, shall be void as against the assignees of such bankrupt or insolvent (y). And a list of such warrants of attorney and cognovits (z), and also an index containing the names, additions and descriptions of the persons giving the same (a), is directed to be kept by the officer of the Queen's Bench, open to public inspection and search on payment of a small fee.

In case of bankruptcy or insolvency.

In addition to these precautions, other provisions have been made to prevent an undue preference being given to one creditor over the others by means of a warrant of attorney or cognovit, in the event of the debtor becoming bankrupt or insolvent. When once the judgment of a court of record was allowed to be diverted from its proper end of expressing and enforcing the opinion of the court, to serve the purpose of a mere security for money due, it was found necessary to guard its use by provisions of the legislature, which have added much to the intricacy of the law. The effect of these provisions appears to be, that if a judgment be entered up against a person by reason of any warrant of attorney or cognovit, no execution taken out on such judgment against his goods can avail the judgment creditor, if such execution be not completed, by sale of the goods, before the creditor has notice of an act of bank-

ing, for execution cannot be issued till judgment is signed; and the Court of Queen's Bench has refused to read the words as "*and execution levied*," which would indeed be making sense, but would be framing, instead of interpreting, the law; *Green v. Wood*, 7 Q. B. 178.

(y) Sects. 2, 3. *Aireton v. Davis*, 9 Bing. 740; S. C. 3 Moo. & Scott, 138; stat. 1 & 2 Vict.

c. 110, s. 60; 7 & 8 Vict. c. 96, s. 20; *Everett v. Wills*, 2 Man. & Gr. 269; *Biffin v. Yorke*, 5 Man. & Gr. 428; *Collins v. Stone*, 4 Q. B. 655; *Bittleston v. Cooper*, 14 Mee. & Wels. 399. The twenty-one days are reckoned exclusively of the day of execution; *Williams v. Burgess*, 12 Adol. & Ell. 635.

(z) Stat. 3 Geo. IV. c. 39, s. 5.

(a) Stat. 6 & 7 Vict. c. 66.

ruptcy committed by the debtor, and before a fiat in bankruptcy issues against such debtor, in case of his bankruptcy (*b*), and before his imprisonment in case of his insolvency (*c*). If the execution be not so previously completed by sale of the goods, the judgment creditor has no other remedy than to come in for his dividend rateably with the other creditors. But a judgment obtained by default in an adverse suit is not within this rule; nor, in the event of the issuing of a fiat in bankruptcy, is a judgment obtained on a *cognovit*, if the action were commenced adversely and not by collusion (*d*). In the case of judgment so obtained, therefore, seizure of the debtor's goods under an execution, if made before the creditor has notice of his having committed an act of bankruptcy, and before the issuing of the fiat in bankruptcy, is valid as against the other creditors, although the execution may not have been completed by sale of the goods (*e*).

Every judgment debt carries interest at the rate of 4*l. per cent. per annum* from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*f*). On the death of the debtor, his judgment debts must be paid in full by his executors or administrators out of his personal estate before any of his

A judgment debt carries interest.

Judgment debts entitled to preference in administration.

(*b*) Stat. 6 Geo. IV. c. 16, s. 108; *Wymer v. Kemble*, 6 Barn. & Cress. 479; S. C. 9 Dowl. & Ry. 511; *Goldschmidt v. Hamlet*, 6 Man. & Gr. 187; stat. 2 & 3 Vict. c. 29; *Whitmore v. Robertson*, 8 Mee. & Wels. 463; *Rawdon v. Wentworth*, 10 Mee. & Wels. 36; *Skey v. Carter*, 11 Mee. & Wels. 571; *Whitmore v. Greene*, 13 Mee. & Wels. 104; *Linnit v. Chaffers*, 4 Q. B. 762.

(*c*) Stat. 1 & 2 Vict. c. 110, s. 61; *Squire v. Huetsen*, 1 Q. B. 308. See also stat. 7 & 8 Vict. c. 96, s. 21.

(*d*) Stat. 1 Will. IV. c. 7, s. 7. See *Crossfield v. Stanley*, 4 Barn. & Adol. 87; S. C. 1 Nev. & Man. 668.

(*e*) See stat. 2 & 3 Vict. c. 29.

(*f*) Stat. 1 & 2 Vict. c. 110, s. 17.

debts on bond or by simple contract (*g*). The decree of a court of equity is equivalent to the judgment of a court of law (*h*). And the privilege of priority of payment extends to the judgments of every court of record, whether superior or inferior; but the judgment of a foreign court is entitled to no precedence over a simple contract debt (*i*). The remedies of the creditor by judgment of any of the superior courts, against the real estate of his debtor, are mentioned in the author's treatise on the Principles of the Law of Real Property (*j*). The remedies against the choses in possession of the debtor have been referred to in a previous part of the present work (*k*). The remedies in respect of the choses in action of the debtor will be hereafter mentioned. In addition to these remedies, such a judgment creditor may imprison the person of his debtor by means of the writ of *capias ad satisfaciendum* (*l*); but, should he do so, he will relinquish all right and title to the benefit of any charge or security which he may have obtained by virtue of his judgment (*m*). If, however, the debt should not exceed 20*l.*, the debtor cannot be imprisoned (*n*) without a previous summons and examination before a commissioner of bankrupt or a judge of a court for the recovery of small debts, who will order the commitment of the debtor only in case of fraud or other ill behaviour (*o*); and the imprisonment will not then operate as any satisfaction of the debt (*p*).

Rem dies of judgment creditors.

Imprisonment by writ of *capias ad satisfaciendum*.

(*g*) Wentworth's Exors. 265, *et seq.* 11th edit.; Williams on Executors, pt. iii. bk. 2, c. 2, s. 2; *Barrington v. Evans*, 3 Y. & Col. 384.

(*h*) *Shafte v. Powel*, 3 Lev. 355.

(*i*) *Dupleix v. De Proven*, 2 Vern. 540. See also *Smith v. Nicolls*, 5 Bing. N. C. 208.

(*j*) P. 58, *et seq.*

(*k*) *Ante*, p. 45.

(*l*) Bac. Abr. tit. Execution (C) 3.

(*m*) Bac. Abr. tit. Execution (D); stat. 1 & 2 Vict. c. 110, s. 16.

(*n*) Stat. 7 & 8 Vict. c. 96, s. 57.

(*o*) Stat. 8 & 9 Vict. c. 127; 9 & 10 Vict. c. 95, s. 99.

(*p*) Stat. 8 & 9 Vict. c. 127, s. 3; 9 & 10 Vict. c. 95, s. 103.

Judgments of the inferior courts may be removed into the superior courts by order of any judge of the latter courts; and immediately on such removal the judgment has the same force, charge and effect as a judgment of the superior court; but it cannot affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, any further than it would have done had it remained a judgment of the inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same (q).

Removal of judgments of inferior courts.

In addition to judgment debts, other debts of record are *recognizances* when duly enrolled (r), and statutes merchant, statutes staple and recognizances in the nature of statutes staple. The three last are now quite obsolete. A recognizance is an obligation entered into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or to pay a debt(s). It is payable out of the personal estate of the debtor, in the event of his decease, next after judgment debts (t).

Recognizances and statutes.

Next in importance to debts of record are *specialty debts*, or debts secured by *special contract* contained in a *deed* (u). These are of two kinds, debts by specialty in which the heirs of the debtor are bound, and debts by specialty in which his heirs are not bound. On the decease of the debtor, both these classes of specialty debts stand on a level so far as regards their payment out of the personal estate of the debtor. They rank

(q) Stat. 1 & 2 Vict. c. 110, s. 22. See Sugd. Vend. & Pur. 670.

(r) *Glynn v. Thorpe*, 1 Barn. & Ald. 153.

(s) 2 Bla. Com. 341.

(t) Williams on Exors. pt. iii. bk. 2, c. 2, s. 2.

(u) 2 Bla. Com. 465. See *ante*, p. 62.

next after debts of record, and take precedence of all debts by simple contract (*x*), with the exception of

Arrears of rent. money owing for arrears of rent, to which the feudal principles of our law have given an importance equal to

Precedence of specialties binding the heir. that of debts secured by deed (*y*). Debts by specialty in which the heirs are bound have, however, a precedence over those in which the heirs are not bound, in case the real estate of the debtor should be resorted to on his decease (*z*), unless he should have charged his real estates by his will with the payment of his debts, in which case all the creditors of every kind will be paid out of the produce of such real estates, without any preference (*a*). For the sake of the advantage which may thus be gained on the decease of the debtor, his heirs are usually bound in every specialty debt. The deed creating the debt may be either a deed of *covenant* or a *bond*. A covenant runs thus: "And the said (*debtor*) doth hereby for himself, his *heirs*, executors and administrators, covenant with the said (*creditor*), his executors and administrators," to pay, &c. A bond is in the following form: "Know all men by these presents, that I (*debtor*), of (*such a place*), am held and firmly bound to (*creditor*), of (*such a place*), in the penal sum of 1000*l.* of lawful money of Great Britain, to be paid to the said (*creditor*) or to his certain attorney, executors, administrators or assigns, for which payment to be well and truly made I bind myself, my *heirs*, executors and administrators, and every of them, firmly by these presents. Sealed with my seal. Dated this 1st day of January, 1848." In both of the above cases it will be observed that the executors and administrators are bound as well as the heirs. This, however, is not absolutely

Covenant.

Bond.

(*x*) *Pinchon's case*, 9 Rep. 88*b*.

(*z*) See Principles of the Law of Real Property, 57.

(*y*) *Wentworth's Exors.* 284, 14th edit.; *Clough v. French*, 2 Coll. 277.

(*a*) 2 Jarm. Wills, 510.

necessary, and the covenant or bond would be equally effectual if the heirs only were named in it (*b*).

A bond in the form above mentioned, without any addition to it, is called a single bond. Bonds, however, have usually a condition annexed to them, that on the person bound (called the obligor) doing some specified act (as paying money when the bond is to secure the payment of money), the bond shall be void. The condition of an ordinary money bond is as follows: "The condition of the above-written bond or obligation is such, that if the above-bounden (*debtor*), his heirs, executors or administrators should pay unto the said (*creditor*), his executors, administrators or assigns, the full sum of 500*l.* (*usually half the amount named in the penalty*) of lawful money of Great Britain, with interest for the same after the rate of 5*l per cent. per annum*, upon the — day of — now next ensuing, without any deduction or abatement whatsoever, then the above-written bond or obligation shall be void, otherwise the same shall remain in full force." Bonds with conditions of this kind have been long in use. In former times, when the condition was forfeited the whole penalty was recoverable (*c*). Equity subsequently interfered, and prevented the creditor from enforcing more than the amount of the damage which he had actually sustained. The courts of law at length began to follow the example of the courts of equity; and according to a course of proceeding, of which there are many examples in the history of our law, the legislature more tardily adopted the rules which had already been acted on in the courts; and by a statute of the reign of Queen Anne it was provided, that, in case of a bond with a condition to be void upon payment of a lesser sum, at a day or place

Single bond.

Bond with condition.

(*b*) Co. Litt. 209 a; *Barber v.* (c) Litt. s. 340.

For, 2 Wms. Saund. 136.

Creditor can recover no more than the penalty.

Except in special circumstances.

certain, the payment of the lesser sum with interest and costs shall be taken in full satisfaction of the bond, though such payment be not strictly in accordance with the condition (*d*). But if the arrears of interest should accumulate to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor can claim no more than the penalty either at law (*e*) or in equity (*f*). If, however, there be special circumstances in the creditor's favor, as if he have a mortgage also for the principal and interest (*g*), or if the debtor has been delaying him by vexatious proceedings (*h*), equity will then aid him to the full extent of his demand (*i*).

~~Bonds for performance of agreements.~~

Bonds are frequently given, not only for securing the payment of money on a given day, but also with conditions to be void on the performance of many other acts agreed to be done, or on the payment of money by instalments. In such cases the law formerly was, that on the breach of any part of the condition, the whole penalty became due; and judgment and execution might be had thereon, subject only to the control of a court of equity on application to it for relief. But now in such cases the obligee (or person to whom the bond is made) must, in bringing his action, state or *assign* the breaches which have been made by the obligor; and although judgment is still recovered for the whole penalty, execution of such judgment is allowed to issue only for the damages in respect of the breaches actually committed;

Assignment of breaches.

(*d*) Stat. 4 & 5 Anne, c. 16, ss. 12, 13. See 3 Burr. 1373; 2 Bla. Com. 311; *Smith v. Bond*, 10 Bing. 125; S. C. 3 Moo. & Scott, 528; *James v. Thomas*, 5 Barn. & Adol. 40.

(*e*) *Wild v. Clarkson*, 6 T. R. 303.

(*f*) *Clarke v. Seton*, 6 Ves. 411; *Hughes v. Wynne*, 1 My. & Keen, 20.

(*g*) *Clarke v. Lord Abingdon*, 17 Ves. 106.

(*h*) *Grant v. Grant*, 3 Sim. 310.

(*i*) 6 Ves. 416.

and the judgment remains as a further security for the damages to be sustained by any future breach (*k*).

The last and most numerous, though least important, class of debts in the eye of the law, are debts by simple contract, which are all debts not secured by the evidence of a court of record, or by deed or specialty. On the decease of the debtor, these debts are payable out of his personal estate, by his executor or administrator, subsequently to all debts of record or by specialty, except voluntary bonds, which are payable after all simple contract debts, but before any of the legacies (*l*). Debts secured by bills of exchange and promissory notes have no preference over the other simple contract debts of the deceased (*m*).

Simple contract debts.

Voluntary bonds.

Bills and notes.

Thus it will be seen that there are now, according to the law of England, five principal kinds of debts, namely, crown debts, judgment debts, specialty debts in which the heirs are bound, specialty debts in which the heirs are not bound, and simple contract debts. Each of these classes has a law of its own, and remedies of varying degrees of efficacy. According to natural justice one would suppose that all creditors for valuable consideration should have an equal right to be paid; or if any difference were allowed, that those who could least afford to lose should be preferred to the others. Our law, however, takes precisely the opposite course, and, for reasons which certainly illustrate the history of England, gives to the crown, representing the public in the aggregate, who can best afford to lose, a decided

Defects in the law of debtor and creditor.

(*k*) Stat. 8 & 9 Will. III. c. 11, s. 8; *Hardy v. Bern*, 5 T. R. 636; *Willoughby v. Swinton*, 6 East, 550; 1 Wms. Saund. 57, n. (1); *Hurst v. Jennings*, 5 Bar. & Cress. 650; S. C. 8 Dow. & Ry. 421.

(*l*) *Lomas v. Wright*, 2 My. & Keen, 769; *Watson v. Parker*, 6 Beav. 283.

(*m*) *Yeoman v. Bradshaw*, 3 Salk. 161.

preference over private creditors, whose loss may be their ruin. Again, a debt admitted without dispute, gives the creditor far less advantage than a debt which has been contested and decreed to be paid by the judgment of a court of record. The proper function of a court of judicature would seem to be the settlement of disputes. In our law, however, the judgment of the court is permitted to be made use of not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favor. So long however as the court exercises its legitimate function of deciding on contested claims, there seems to be no reason why a debt established by the decision of the court should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities, by collusion or agreement of the parties, would at once fall to the ground; and an end would be put to a very fruitful source of litigation and fraud. Practically there are but two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability, or because he is unable to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court in exercise of its proper function, is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. If however the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavours, by suing out an execution, to obtain an advantage over other creditors, who may not have put

themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others ; and when a man is unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary privileges conferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid. With respect to the three last classes of debts, namely, debts by specialty in which the heirs are bound, those in which the heirs are not bound, and simple contract debts, the distinctions between them serve principally to mark the steps of the struggle by which the rights of creditors have at length been obtained. The trophies of a victory so hardly won can scarcely be expected to present a very orderly appearance. The rights of these creditors accordingly vary with the accident of the death of the debtor, with the proportion which his real estate may bear to his personalty, and with the circumstance of his having or not having charged his real estate by his will with the payment of his debts ; although, as we shall see, he can bring them all to a level by becoming, if he please, a bankrupt or insolvent. Surely it is time that the law of debtor and creditor were placed upon some more simple and reasonable footing.

The next subject which claims our attention is that of interest upon debts. The absurd prejudice which ^{Interest on debts.} anciently caused interest, under the name of usury, to be considered unlawful, retained some hold upon our law long after the taking of interest was rendered lawful by act of parliament (n)X In ordinary cases a debtor was allowed to withhold payment of his debt, without

(n) Stat 37 Hen. VIII. c. 9.

being obliged to give to his creditor the poor recompense of interest on the money he was making use of for his own benefit. For until recently it was a general rule of law, that interest was not payable on any debts, whether by specialty or simple contract, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances, or unless the debt were secured by a bill of exchange or promissory note, which, being mercantile securities, always carried interest (*o*). But in equity interest was more frequently allowed (*p*). And now by a recent act (*q*) interest is recoverable on all debts payable by virtue of any written instrument, at a certain time, from the time when such debts were payable, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

Sureties.

The payment of a debt is sometimes secured by a *surety*, who makes himself liable, together with the principal debtor, for the payment. If the surety should pay the debt, he will become the creditor of the principal debtor for the amount; but although the debt paid should have been secured to the original creditor by the bond under seal of the debtor and his surety, the surety, having paid the debt, will become the simple contract creditor only of the principal debtor; unless he should have taken the precaution to procure from such debtor a counter-bond for his own indemnity (*r*).

(*o*) *Higgins v. Sarjent*, 2 Barn. & Cres. 348; S. C. 3 Dow. & Ry. 613; *Foster v. Weston*, 6 Bing. 709; *Page v. Newman*, 9 Barn. & Cres. 378.

(*p*) See *Lowndes v. Collins*, 17

Ves. 27; 2 Fonb. Eq. 429; C. P. Cooper, 246, *et seq.*

(*q*) Stat. 3 & 4 Will. IV. c. 42, ss. 28, 29; *Hyde v. Price*, 8 Sim. 578.

(*r*) *Copis v. Middleton*, Turn. & Russ. 224.

The surety, however, will be entitled to the benefit of all collateral securities which the creditor, whom he has repaid, held for the debt; but he cannot be entitled to the original bond executed by the debtor, because that is at an end by the very fact of the payment (s). In the words of Lord Brougham (t), the court admits the surety's right, as against the principal debtor, to stand in the shoes of the creditor, but says there are no shoes for him to stand in. If there should have been more than one surety, any one surety, paying the whole debt, is entitled, according to the general principles of justice, to contribution from his co-sureties in equal shares, or if they should have been sureties to unequal amounts, then in proportion to the respective amounts to which they have made themselves liable (u). And in equity, if any surety has become insolvent, the others must contribute rateably to the payment of the whole debt (x). But if the surety has paid no more than his own proportion of the debt, he cannot obtain contribution from any of the others (y); nor will contribution be allowed when the suretyship of one person is a distinct transaction from that of the others (z). A surety, however, may be discharged from his liability by the conduct of the creditor. As surety he has made himself liable only for the payment of a particular debt at a given time, or under certain given circumstances. If therefore the creditor, by any subsequent arrangement with the principal debtor, preclude himself from demanding payment

Co-sureties.

Discharge of surety.

(s) Turn. & Russ. 231; *Dowbiggen v. Bourne*, 2 You. & Coll. 462; *Jones v. Davids*, 4 Russ. 277; *Caulfield v. Maguire*, 2 Jones & Lat. 164, 168.

(t) *Hodgson v. Shaw*, 3 My. & Keen, 183, 194.

(u) *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270, 272, 273; *Brown v. Lee*, 6 Barn. &

Cress. 689; S. C. 9 D. & R. 701.

(x) *Peter v. Rich*, 1 Cha. Rep. 31.

(y) *Ex parte Gifford*, 6 Ves. 807; *Davies v. Humphreys*, 6 Me. & Wels. 153, 168, 169.

(z) *Coope v. Twynam*, T. & Russ. 426; *Craythorne v. Swinburne*, 14 Ves. 160; *Pendlebury v. Walker*, 4 You. & Col. 424.

of his debt at the time or under the circumstances originally agreed on, the surety will be at once discharged from all liability (*a*). Thus if the creditor bind himself to give further time for payment to the principal debtor (*b*), or compound with him, without expressly reserving his remedy against the surety (*c*), the surety will be discharged. But the acceptance by the creditor from the principal debtor of a new and independent security for the debt will not discharge the surety (*d*). Neither will the surety be discharged by the mere neglect of the creditor to enforce payment of the debt from the principal debtor at the time of its becoming due (*e*); nor by the creditor's express agreement to give time to the principal debtor, if such agreement fail in any of the requisites of a binding contract (*f*).

Alienation of debts.

We now approach the subject of the alienation of debts, to which some reference has already been made. We have seen that a debt was anciently considered as a mere right to bring an action against the debtor, and as such was incapable of being transferred (*g*). In process of time however an assignment of a debt was permitted to take place by means of an authority from the creditor to his assignee to sue the debtor in the creditor's name. This authority is usually called a *power of attorney*, which need not be by deed, but may be by

Power of attorney.

- (*a*) *Calvert v. London Dock Company*, 2 Keen, 638; *Heath v. Key*, 1 Y. & Jerv. 434; *Nicholson v. Revill*, 4 Ad. & Ell. 675, 683; *Blake v. White*, 1 You. & Coll. 420; *Bowser v. Cox*, 4 Beav. 379; 6 Beav. 110.
- (*b*) *Samuel v. Howarth*, 3 Meriv. 272; *Eyre v. Bartrop*, 3 Madd. 221.
- (*c*) *Ex parte Gifford*, 6 Ves. 807; *Ex parte Carstairs*, Buck,
- 560; *Maltby v. Carstairs*, 7 Bar. & Cress. 737; S. C. 1 Man. & Ry. 549; *Thompson v. Lock*, 3 C. B. 540.
- (*d*) *Bell v. Banks*, 3 Man. & Gr. 258.
- (*e*) *Eyre v. Everett*, 2 Russ. 381; *Peel v. Tutlock*, 1 B. & P. 419.
- (*f*) *Philpot v. Briant*, 4 Bing. 717.
- (*g*) *Ante*, p. 41.

writing unsealed (*h*), or even by parol (*i*); and when a debt is a *legal* debt, recoverable only in a court of law, it cannot be effectually assigned without such a power. The assignment of debts by means of powers of attorney is now recognised and protected by the courts of law. Thus in a case where the original creditor became bankrupt after he had assigned his debt, it was held that an action against the debtor might still be properly brought in the name of such original creditor, by virtue of the power of attorney which he had given to his assignee; although if no assignment had been made, the assignees of the creditor under the bankruptcy would have been the proper parties to sue (*k*). So if a power of attorney be given, on an assignment of a debt, for a valuable consideration, it is held to be irrevocable by the assignor (*l*). When a debt or demand is *equitable* only, that is of a nature to be recoverable only in the Court of Chancery, it may be assigned without a power of attorney; for equity will allow the assignee to sue in his own name. When a debt is assigned, the title of the assignee is not complete until he has given to the debtor notice of the assignment (*m*); for the debtor, if he has had no notice of the assignment, may lawfully pay his debt to the original creditor, and will be effectually discharged by his receipt.

Notice to the debtor.

Bills of exchange and promissory notes are, as we have already seen (*n*), exceptions to the rule which requires a power of attorney to enable the assignee to sue the debtor for the debt assigned. The custom of merchants was in ancient times sufficiently powerful to countervail in this respect the strictness of the common

Bills and notes.

(*h*) *Howell v. M'ivers*, 4 T. R. 690.

(*i*) *Heath v. Hall*, 4 Taunt 326.

(*k*) *Winch v. Keeley*, 1 T. R. 619; *Parnham v. Hurst*, 8 Mee. & Wels. 743.

(*l*) *Walsh v. Whitcomb*, 2 Esp. 565.

(*m*) See *post*, the chapter on Title.

(*n*) *Ante*, p. 4.

law, and the holder of a bill of exchange was able to sue upon it in his own name. By a statute of Anne (*o*) promissory notes were made assignable or indorsable over in the same manner as inland bills of exchange might be according to the custom of merchants.

Involuntary
alienation of
debts.

Debts being formerly considered as mere rights of action, could not be taken in execution on a judgment obtained against the creditor; neither can they now be made available unless secured by some cheque, bill, note, bond, specialty or other security (*p*). But when they are so secured, the act for extending the remedies of creditors against the property of debtors (*q*), provides that under the writ of *fieri facias* (*r*) the sheriff may seize not only money and bank notes, but also the securities above mentioned, and may sue upon them in his own name on the arrival of the time of payment; but the sheriff is not bound to sue unless indemnified in the manner prescribed by the act from the costs of the action.

Bankruptcy or
insolvency.

In the event of bankruptcy or insolvency, the assignees of the bankrupt or insolvent are empowered to sue for debts owing to him in their own names for the benefit of his creditors (*s*).

Payment of
debts.

Payment of
smaller sum no
satisfaction of
larger.

We have now to consider the payment of debts. And in the first place, the payment of a smaller sum is no satisfaction of a larger one, unless there be some consideration for the relinquishment of the residue (*t*), such

(*o*) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25, s. 3.

(*p*) *Harrison v. Paynter*, 6 Mee. & Wels. 387; *Wood v Wood*, 1 Q. B. 397.

(*q*) St. 1 & 2 Vict. c. 110, s. 12.

(*r*) See *ante*, p. 45.

(*s*) Stat. 6 Geo. IV. c. 16, s. 63; 1 & 2 Will. IV. c. 56, s. 25; 1 & 2 Vict. c. 110, s. 51; 7 & 8 Vict. c. 96, s. 13.

(*t*) *Cumber v. Wane*, 1 Strange, 425; S. C. 1 Smith's Leading Cases, 146; *Fitch v. Sutton*, 5 East, 230.

as the payment at an earlier time than the whole is due (*u*), or the concurrence of the rest of the creditors of the debtor in accepting a composition (*x*). But it seems that the acceptance of a *negociable security* for a small amount may be a good satisfaction for a larger debt (*y*); and the payment of a small sum may be a good satisfaction for an unliquidated demand for large pecuniary damages, on account of the uncertainty of such a claim (*z*). When a less sum is paid to the creditor than the whole amount of his demands, it is competent to the debtor to make the payment in satisfaction of any demand he may please, and the creditor must appropriate the payment accordingly (*a*); but if the payment be made generally without any express appropriation, the creditor may elect, at the time of payment (*b*), or within a reasonable time after (*c*), to appropriate the money to whichever demand he may please. And if no election as to the appropriation of the payment should be made on either side, the law will, in ordinary cases of current accounts, presume that the first item on the debit side is discharged or reduced by the first payment entered on the credit side, and so on in the order of time (*d*). When the debt carries interest, the payment is considered to be applied in the first place in discharge of the interest then due, and the surplus, if any, in discharge *pro tanto* of the principal. For no creditor would apply any payment to the discharge of part of the principal, which carries interest, instead of to the discharge of interest, for which, when due, no further interest is payable (*e*).

Appropriation
of payments.

(*u*) Co. Litt. 212 b.

(*b*) *Devaynes v. Noble*, 1 Mer.

(*x*) *Reay v. Richardson*, 2 Cro. 601.

Mcc. & Rosc. 422.

(*c*) *Simson v. Ingham*, 2 Barn.

(*y*) *Sibree v. Tripp*, 15 Mcc. & Wels. 23.

& Cress. 65.

(*d*) 1 Meriv. 608; *Williams v.*

(*z*) *Wilkinson v. Byers*, 1 Ad. & Ell. 106.

Rawlinson, 10 J. B. Moore, 362.

(*e*) *Bomer v. Marris*, 1 Cr. &

(*a*) *Shaw v. Picton*, 4 Barn. & Cress. 715.

Phi. 351, 355.

Composition
with creditors.

When a person becomes so embarrassed as to be unable to pay all his debts in full, he usually endeavours to enter into a composition with his creditors, prevailing on them to accept so much in the pound, and to allow a given time for payment. In this case a *letter of license* is generally given by the creditors, by which they covenant not to take any proceedings for their debts in the meantime; and this license is frequently embodied in a *deed of inspektorship*, by which certain inspectors are appointed to watch the winding up of the debtor's affairs on behalf of the creditors. The payment of the composition is sometimes guaranteed by some friends of the debtor as his sureties, and when payment is made, a release of all demands is given by the creditors. If, however, the composition should not be punctually paid, the creditors will no longer be restrained from proceeding to enforce the full payment of their debts (*f*). Such creditors as hold security for their debts should openly stipulate that their securities are not to be affected; and such a stipulation will be sufficient to preserve them (*g*). But any secret agreement between the debtor and a creditor, by which he is to have any advantage over the others, in order to induce him to agree to the composition, is evidently a fraud on the other creditors, and as such is absolutely void (*h*), and prevents the creditor who is party to it from suing for his share in the composition (*i*).

Assignment to
trustees for
creditors void
as an act of
bankruptcy.

In some cases an assignment of the debtor's estate and effects is made to trustees for sale and conversion

(*f*) *Cranley v. Hillary*, 2 Mau. & Selw. 120.

(*g*) *Nichols v. Norris*, 3 Barn. & Adol. 41; *Ex parte Glendinning*, Buck, 517; *Lee v. Lockhart*, 3 Mylne & Craig, 302; *Cullingworth v. Loyd*, 2 Beav. 385, and the cases collected p. 395;

Bush v. Shipman, 14 Sim. 239.

(*h*) *Leicester v. Rose*, 4 East, 372; *Knight v. Hunt*, 5 Bing. 432; *Pendlebury v. Walker*, 4 You. & Coll. 424; *Alsager v. Spalding*, 4 N. C. 407.

(*i*) *Howden v. Haigh*, 11 Adol. & Ell. 1033.

into money, to be divided rateably amongst the creditors. As however this is the process adopted by the law in case of bankruptcy, where it is carried on under judicial sanction, the law considers that such an assignment of the whole of the estate of a person in trade is an act of bankruptcy, and as such void, if there be any creditor or creditors who have not concurred in it of sufficient amount to sue out a fiat in bankruptcy (*k*).

An exception to this rule is made, if a ~~flat~~ do not issue within six calendar months from the execution of such a deed by any trader, provided the deed be executed by every trustee within fifteen days after the execution thereof by the trader, and that the execution by such trader and by every such trustee be attested by an attorney or solicitor; and provided that notice be given within two months after the execution thereof by such trader, in the London Gazette and two London daily newspapers, if he reside in London or within forty miles of it; or in the London Gazette, one London daily newspaper, and one provincial newspaper published near to such trader's residence, if he do not reside within forty miles of London; and such notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee and of such attorney or solicitor (*l*).

Exception. 17c6
(3) see 17c2
c106

An act has lately been passed for facilitating arrangements between debtors and creditors (*m*), which applies only to such debtors as are not traders within the bankruptcy laws. Under this act any such debtor, with the concurrence of one-third in number and value of his creditors, may, with the sanction of a commissioner of


Act to facilitate arrangements between debtors and creditors.

(*k*) *Tappenden v. Burgess*, 4 East, 230; *Dutton v. Morrison*, 17 Vcs. 193, 199; *Powell v. Lloyd*, 2 You. & Jerv. 372; *Ex parte Philpott*, Court of Review, 10 Jur. 717. See *post*, the chapter on Bankruptcy.
(*l*) Stat. 6 Geo. IV. c. 16, s. 4.
(*m*) Stat. 7 & 8 Vict. c. 70.

- 17c6
396 not
778 17c2

The man who wrote the above story
is a Quaker and is a very fine man

the Court of Bankruptcy, and if his debts have not been improperly incurred, procure two meetings of his creditors to be called, to consider any proposal for the payment or compromise of his debts. And if the major part of the creditors in number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, at the first meeting, and three-fifths in number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, at the second meeting, agree to the composition, it will be binding as against all the other creditors who had notice of the meetings, provided it be confirmed by the commissioner, and provided one full third in number and value of all the creditors were present at the second meeting, either in person or by an authorized agent.



CHAPTER IV.

OF BANKRUPTCY.

UNDER some circumstances a debtor is discharged by law from his debt without any actual payment, or without payment of more than a part of it. This occurs in the case of bankruptcy and insolvency, of each of which some notice appears desirable.

And first as to bankruptcy. No person can be a bankrupt who is not a trader within the meaning of the laws relating to bankrupts. The persons who are such traders are all ^{also makers of the money received of, and} bankers, brokers, scriveners receiving other men's monies or estates into their trust or custody, persons insuring against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels or coffee houses, dyers, painters, bleachers, fullers, callenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise in gross or by retail, and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities (a), and also all livery stable keepers, coach proprietors, carriers, shipowners, auctioneers, apothecaries, market gardeners, cowkeepers, brickmakers, alum makers, limeburners, and millers (b). But no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member or subscriber to any incorporated commercial or trading companies established by charter

Who may be a bankrupt.

(a) Stat. 6 Geo. IV. c. 16, s. 2. (b) Stat. 5 & 6 Vict. c. 122, s. 10.

or act of parliament, shall be deemed as such a trader liable to become bankrupt (*c*). An attorney or solicitor, as such, is not within the bankrupt law; but if he is in the habit of receiving his clients' money into his own hands and investing it for them, and charging a compensation for so doing, in addition to his charges for other professional business, he will be liable to become bankrupt as a scrivener receiving other men's monies into his trust (*d*). An alien or denizen is within the bankrupt law (*e*); and so is a married woman carrying on trade for her separate use by the custom of London (*f*), or whilst her husband is undergoing sentence of transportation (*g*). But an infant under the age of twenty-one years cannot be a bankrupt, because by the law of England he cannot be made liable on contracts entered into by him in the course of trade (*h*).

Attorney or solicitor not liable as such.

Alien or denizen.
Married woman.

Infant.

Act of bankruptcy.

A person within the bankrupt laws becomes bankrupt by committing an *act of bankruptcy*. The following acts, if done with intent to defeat or delay the creditors of a trader, are acts of bankruptcy, namely, if any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwellinghouse, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, monies, or chattels to be attached, sequestered or taken in execution, or make or cause to be made either within this realm or elsewhere any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or

(*c*) Stat. 6 Geo. IV. c. 16, s. 2.

(*d*) *Malkin v. Adams*, 2 Rose, 28; *Ex parte Bath*, Mont. 82, 84, where the cases are collected.

(*e*) Stat. 6 Geo. IV. c. 16, s. 135; 5 & 6 Vict. c. 122, s. 93.

(*f*) *Ex parte Carrington*, 1 Atk. 206.

(*g*) *Ex parte Franks*, 7 Bing. 762; 1 M. & Scott, 1.

(*h*) *Belton v. Hodges*, 9 Bing. 365, 370.

make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels (*i*). It is also an act of bankruptcy for a trader to lie in prison for debt for twenty-one days, or having been committed or detained for debt, to escape out of prison or custody (*k*). Lying in prison.
Escape.

Most of the above acts of bankruptcy have been such ever since a bankrupt was first defined by the statute of Elizabeth "touching orders for bankrupts (*l*).” Bankruptcy was then considered as a crime, and the bankrupt was called "an offender (*m*).” But in modern times bankruptcy has been looked upon as the proper remedy for a trader in embarrassed circumstances. He gives up all his property to his creditors, to be divided rateably amongst them; and, if his behaviour has been free from serious blame, he obtains a discharge from past liabilities, together with a small allowance to enable him to begin the world again (*n*). An act of bankruptcy may accordingly now be committed by merely filing in the office of the Lord Chancellor's secretary of bankrupts a formal declaration, signed by the trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, provided a ^{petition in adjudication of} ~~that in~~ bankruptcy issue within two calendar months (*o*). And a ~~that~~ ^{petition} in bankruptcy, under which the trader is now declared bankrupt (*p*), may be ~~issued upon his own petition~~ ^{filed} by any trader who shall have filed such a declaration (*q*). So an act of bankruptcy may now be lawfully concerted or agreed upon between the bankrupt and any creditor Declaration of
insolvency.

Concerted
bankruptcy.

(*i*) Stat. 6 Geo. IV. c. 16, s. 3.

(*o*) Stat. 5 & 6 Vict. c. 122,

(*k*) Sect. 5.

ss. 22, 93.

(*l*) Stat. 13 Eliz. c. 7.

(*p*) Stat. 1 & 2 Will. IV. c. 56,

(*m*) Stat. 13 Eliz. c. 7, s. 10;

s. 12; 5 & 6 Vict. c. 122, ss. 3, 4.

2 Black. Com. 471.

(*q*) Stat. 7 & 8 Vict. c. 96, s.

(*n*) Stat. 5 & 6 Vict. c. 122, s. 41.

Filing affidavit
of debt.

~~any creditor need not
file an affidavit of debt
if the trader admits the debt~~
24-13

Admission of
debt and non-
payment.

7022

or other person (*r*), which was not the case at the time when bankruptcy was considered an offence (*s*). It is also now provided that, on a proper affidavit of debt being made by any creditor, stating, amongst other things, the delivery to the trader *personally* of written particulars of his demand, with notice requiring immediate payment, such trader may be summoned to appear before the bankrupt court either to admit the demand, or to swear that he verily believes that he has a good defence to such demand or to some part of it (*t*). And if he admits the demand, and does not satisfy the creditor within fourteen days next after the filing of such admission, he commits an act of bankruptcy on the fifteenth day after the filing of such admission, provided a fiat issue against him within two calendar months from the filing of the creditor's affidavit (*u*). After such a summons, an admission of debt may be made with the same effect, without the trader's appearing in court, provided there be present some attorney of one of her majesty's superior courts of law on behalf of such trader, expressly named by him and attending at his request, to inform him of the effect of such admission before the same is signed by him, and provided also that such attorney do subscribe his name thereto as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the said trader, and state therein that he subscribes as such attorney; and such admission must also be made in the prescribed form (*x*). If the trader do not appear when summoned, or if on appearing he refuse to sign the admission of debt (*y*), or admit only part, without swearing to his belief that he has a good defence to the

(*r*) Stat. 5 & 6 Vict. c. 122, s. 8.

(*s*) *Ex parte Gouthwaite*, 1 Rose, 87; *Ex parte Brookes*, Buck, 257.

(*t*) Stat. 5 & 6 Vict. c. 122, ss. 11, 12.

(*u*) Sect. 14.

(*x*) Sect. 17.

(*y*) Sect. 16.

debt or to the part not admitted, then he commits an act of bankruptcy on the fifteenth day after service of the summons, unless within fourteen days from such service, or within such enlarged time as may be granted to him, he satisfies the creditor, or enters into a bond with two sureties, to be approved by the court, to pay such sum and costs as shall be recovered in any action for the debt; but the fiat must issue within two calendar months from the filing of the creditor's affidavit (z).

Again, if a creditor recover judgment against a trader in any personal action for the recovery of any debt or money demand in any court of record, and be in a situation to sue out execution upon such judgment, and there be nothing due from him by way of set-off, he may serve notice in writing upon such trader personally, requiring immediate payment of such judgment debt;

Nonpayment of judgment debt.

and if the trader do not pay or satisfy him within ~~fourteen~~ ^{fourteen} days after such service, he commits an act of

bankruptcy on the ~~fifteenth~~ ^{fifteenth} day after service of such notice (a). So if any trader shall disobey any order or decree made in any cause in Chancery, or in any matter of bankruptcy or lunacy, and duly served on him, for payment of any sum of money, the court may, by order,

Disobeying decree or order for payment of money.

fix a peremptory day for payment; and if such trader being personally served with such last-mentioned order

~~fourteen~~ ^{fourteen} days before the day therein appointed for payment of such money, shall neglect to pay the same, he

commits an act of bankruptcy on the ~~fifteenth~~ ^{fifteenth} day after the service of such order (b). It is also an act of bank-

Petitioning for discharge under Insolvent Debtors' Act.

ruptcy for a trader in prison to file a petition for his discharge under the act for relief of insolvent debtors, provided he be declared bankrupt before the time advertized for him to be brought up to be dealt with according to the act, or within two calendar months from the time of the order vesting his estate in the provisional assignee; and in such case his estate is divested out of

such assignee (*c*). No person is now liable to become bankrupt by reason of any act of bankruptcy committed more than twelve calendar months prior to the issuing of any fiat in bankruptcy against him (*d*).

Petitioning creditor.

When an act of bankruptcy has been committed by a trader, any creditor or creditors may petition for a fiat in bankruptcy against him, provided the amount of their debts be as follows:—the single debt of any creditor, or of two or more being partners, 50*l.* or upwards; the debt of two creditors, 70*l.* or upwards; and the debt of three or more creditors, 100*l.* or upwards: and every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may petition or join in petitioning, whether he shall have had any security in writing for such sum or not (*e*). The debt however must be a legal debt, and one for which the creditor might sue at law in his own name (*f*). An affidavit of debt is sworn by the petitioning creditor, and an entry of it is made in a book called the Docket Book. This is called *striking a docket*. A bond was also, till recently, always required from the petitioning creditor, conditioned for proving his debt, and for proving the party to have committed an act of bankruptcy at the time of issuing the fiat, and for proceeding upon the fiat (*g*). But this bond may now be dispensed with, if the Lord Chancellor shall think fit (*h*). If the trader shall, after the docket has been struck against him, pay to the petitioning creditor any money, or give him any satisfaction or security for his debt, or any part thereof, whereby

Striking a docket.

Compounding with petitioning creditor an act of bankruptcy.

(*c*) Stat. 1 & 2 Vict. c. 110, s. 39. 899; *Ex parte Sutton*, 11 Ves. 163.

(*d*) Stat. 5 & 6 Vict. c. 122, s. 7.

(*g*) Stat. 6 Geo. IV. c. 16, s. 13.

(*e*) Sect. 9.

(*h*) Stat. 5 & 6 Vict. c. 122, s. 3.

(*f*) *Medlicot's case*, 2 Str.

he may receive more in the pound in respect of his debt than the other creditors, such trader thereby commits an act of bankruptcy; and if any fiat shall have been issued upon the docket so struck, the Lord Chancellor may either declare such fiat to be valid and direct the same to be proceeded in, or may order it to be superseded; and a new fiat may issue, which may be supported by proof either of such last-mentioned or of any other act of bankruptcy (*i*).

When the docket has been struck, the creditor presents a formal petition to the Lord Chancellor, whereupon a fiat in bankruptcy issues, whereby the creditor is authorized to prosecute his complaint against the trader in the Court of Bankruptcy, or before one of the commissioners of that court (*k*). Formerly a commission of bankruptcy under the great seal issued in every case, whereby certain persons were appointed commissioners for the purpose of directing that particular bankruptcy (*l*). Subsequently a Court of Bankruptcy was erected in London, and certain fixed commissioners appointed, by any one of whom the duties of a commissioner were to be performed in all cases of bankruptcies in London (*m*). And more recently fixed commissioners have been appointed throughout the country, each of whom has a separate district, and forms a court of record whilst acting in the prosecution of any fiat (*n*).

Fiat in bankruptcy.

The fiat having issued, the debt, the trading, and the act of bankruptcy are proved by the petitioning creditor, whereupon the trader is adjudged a bankrupt by

The adjudication.

(*i*) Stat. 6 Geo. IV. c. 16, s. 8. 6 Geo. IV. c. 16, s. 12.

(*k*) Stat. 1 & 2 Will. IV. c. 56, (*m*) Stat. 1 & 2 Will. IV. c. 56.
s. 12. (*n*) Stat. 5 & 6 Vict. c. 122,

(*l*) Stat. 13 Eliz. c. 7, s. 2; s. 59, *et seq.*

the court to which the fiat is directed (*o*); and a duplicate of the adjudication is then served on the bankrupt, who is allowed five days from such service to show cause against the validity of the adjudication; and if, at the expiration of that time, he can show no such cause, notice of the adjudication is forthwith advertised in the London Gazette; and two public sittings of the court are appointed for the bankrupt to surrender and conform, the last of which must be on a day not less than thirty and not exceeding sixty days from such advertisement, and must be the day limited for such surrender. But notice of the adjudication may be advertised immediately, with the consent of the bankrupt testified in writing under his hand before the court (*p*).

Freedom from
arrest.

The bankrupt is free from arrest and imprisonment by any creditor in coming to surrender, and after such surrender during the time limited for such surrender, and such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed and confirmed (as after mentioned), as the court shall, from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint, provided he was not in custody at the time of such surrender (*q*).

Gazette is
evidence of
bankruptcy.

If the bankrupt do not commence proceedings to dispute the fiat, and prosecute the same with diligence and effect within twenty-one days after the advertisement (if he were within the united kingdom at the date of the adjudication), or within three calendar months (if in any other part of Europe), or within a twelvemonth (if elsewhere); the Gazette containing the advertisement is conclusive evidence in all cases as against such bank-

(*o*) Stat. 6 Geo. IV. c. 16, s. 21; 5 & 6 Vict. c. 122, s. 1.

(*p*) Stat. 5 & 6 Vict. c. 122, s. 23.

(*q*) *Ibid.*

rupt, and in all actions by his assignees for his debts, that he became a bankrupt previously to the fiat, and that the fiat was sued forth on the day stated in the Gazette (*r*).

Along with the advertisement of the bankruptcy Official assignee. appears that of the appointment of an official assignee of the bankrupt's estate. The official assignees are officers of the Bankruptcy Courts, one of whom is appointed by the court to act for every bankruptcy. His duty is to receive all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of the estate and effects, real and personal, of the bankrupt; and, until other assignees are chosen by the creditors, he is the sole assignee of the bankrupt's estate and effects (*s*), all of which, copyholds only excepted (*t*), vest in such assignee by virtue of his appointment (*u*).

At the public sittings of the court the creditors of the bankrupt prove their debts. As the bankrupt is discharged from such claims only as have been or might have been proved under the bankruptcy, provision has been made for the proof of as many demands as possible. Thus a security, payable at a future time, may be proved with a rebate of interest at the rate of five per cent., to be computed from the declaration of a dividend to the time at which the debt secured would have become payable according to the terms upon which it was contracted (*x*). Provision is also made for the set-off of mutual credits or debts between the bankrupt and any creditor, so that the balance only

(*r*) Stat. 5 & 6 Vict. c. 122, s. 24. 64; see Principles of the Law of

(*s*) Stat. 1 & 2 Will. IV. c. Real Property, 278.

56, s. 22; 5 & 6 Vict. c. 122, (*u*) Stat. 1 & 2 Will. IV. c. 56, ss. 25, 26, 27.

s. 48. (*x*) Stat. 6 Geo. IV. c. 16, s. 51.

shall be claimed or paid on either side (*y*); also for the proof of any debt by any surety for the bankrupt who may have paid it, although after the issuing of the fiat, but not so as to disturb former dividends (*z*). Persons insured may also prove after the happening of the loss, and may receive dividends with the other creditors, as if the loss had happened before the issuing of the fiat (*a*). Annuity creditors may also prove for the value of their annuities, to be ascertained by the commissioner, regard being had to the original price (*b*); and if there should be any collateral surety for the annuity, he will be discharged from all claims in respect of the annuity on payment of the amount so proved (*c*). Debts payable upon contingencies which shall not have happened before the issuing of the fiat, may be valued by the commissioner on the application of the creditor, and the amount so ascertained may be proved as the debt (*d*). Interest on overdue bills and notes may also be proved (*e*); also the costs, though untaxed, of obtaining any judgment, decree or order which may have been made for any debt or demand, in respect of which the plaintiff or petitioner shall prove under the fiat (*f*). But the commissioner has power to expunge the proof of any debt either wholly or in part, if, upon proper evidence, he shall be of opinion that it is not due (*g*). If any creditor should hold security upon any part of the property of the bankrupt by way of mortgage or lien, such creditor will not be allowed to prove for the full amount of his debt without giving up his security for the benefit of the other creditors (*h*). But

Creditor holding
security.

(*y*) Stat. 6 Geo. IV. c. 16, s. 50.

(*z*) *Ibid.* s. 52.

(*a*) *Ibid.* s. 53.

(*b*) *Ibid.* s. 54.

(*c*) *Ibid.* s. 55.

(*d*) *Ibid.* s. 56.

(*e*) Stat. 6 Geo. IV. c. 16, s. 57.

(*f*) *Ibid.* s. 58.

(*g*) *Ibid.* s. 60.

(*h*) *Ex parte Downes*, 18 Vcs. 290.

if he be the sole incumbrancer on the property (*i*), he may obtain an order for its sale; and in case the money arising from the sale should be insufficient to pay him his due, he will be admitted a creditor under the fiat for the deficiency, and receive dividends rateably with the rest of the creditors, but so as not to disturb any dividends already made (*k*).

At the first public meeting appointed by the court, assignees of the bankrupt's estate are chosen, in addition to the official assignee, by the major part in value of the creditors who have proved debts to the amount of 10*l*. and upwards, subject to the power of the commissioner to reject any person chosen who shall appear to him to be unfit (*l*). The creditors' assignees, as they are called, have the sole right of appointing and removing the solicitor to the bankruptcy, and of directing the time and manner of effecting the sale of the bankrupt's estate and effects (*m*). On their appointment all the estate and effects of the bankrupt vested in the official assignee vests in them jointly with him without any conveyance or assignment; and as often as any assignee dies or is lawfully removed, and a new assignee is duly appointed, all such real and personal estate as was then vested in the deceased or removed assignee, vests by virtue of such appointment in the new assignee, either alone or jointly with the existing assignees, as the case may require (*n*). The bankrupt, however, is not bound to deliver up the necessary wearing apparel of himself, his wife and children (*o*). Formerly a deed of bargain and sale was

Creditors' assignees.

(*i*) *Ex parte Jackson*, 5 Ves. 357; *Ex parte Topham*, 1 Madd. 38.

(*k*) Lord Loughborough's Order of 8th March, 1794.

(*l*) Stat. 6 Geo. IV. c. 16, s. 61; 1 & 2 Will. IV. c. 56, s. 20.

(*m*) Stat. 1 & 2 Will. IV. c. 56, s. 23; 5 & 6 Vict. c. 122, s. 49.

(*n*) Stat. 1 & 2 Will. IV. c. 56, ss. 25, 26, 27.

(*o*) Stat. 6 Geo. IV. c. 16, s. 112; *Ex parte Ross*, 1 Rose, 33; S. C. 17 Ves. 374.

executed by the major part of the commissioners acting in the bankruptcy to the assignees, whereby all the real and personal estate of the bankrupt, except copyholds, was conveyed and assigned to the assignees (*p*). But at length, in the year 1831, when the Court of Bankruptcy was established in London, it was discovered that the mere appointment of the assignees might operate as effectually as a deed of conveyance to vest the bankrupt's estate in them.

The title of the assignees relates back to the act of bankruptcy.

New enactment.

As the bankruptcy of a person consists in his committing an act of bankruptcy, and not in his being adjudged bankrupt, his assignees, when appointed, become entitled to all the real and personal estate of which he was possessed at the hour when he committed the act (*q*), though the legal estate in the bankrupt's lands remains vested in him until conveyed to the assignees by their appointment (*r*). The title of the assignees, it is said, relates back to the act of bankruptcy. The consequences of this rule were formerly very serious, as many *bonâ fide* transactions were overturned in consequence of an act of bankruptcy having been committed by one of the parties without the knowledge of the other. But after several partial remedies (*s*), it is now enacted that all contracts, dealings and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of

(*p*) Stat. 6 Geo. IV. c. 16, ss. 63, 64.

(*q*) *Thomas v. Desanges*, 2 Bar. & Ald. 586; *Rouch v. Great Western Railway Company*, 1 Q. B. 51.

(*r*) *Doe d. Esdaile v. Mitchell*, 2 Mau. & Selw. 446.

(*s*) Stat. 46 Geo. III. c. 135, s. 1; 49 Geo. III. c. 121, s. 2; 56 Geo. III. c. 137, s. 1; 6 Geo. IV. c. 16, ss. 81, 82, 84; 2 & 3 Vict. c. 11, s. 12.

the fiat, shall be deemed to be valid notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed (*t*). The effect of this enactment is to substitute the date and issuing of the *fiat* for the *act* of bankruptcy, so far as respects all persons dealing and acting *bonâ fide* and without notice of the act of bankruptcy. It does not therefore render valid, executions levied but not completed before the *fiat*, on judgments obtained by warrant of attorney or cognovit without any adverse action (*u*); for such executions were by a former enactment rendered void as against the other creditors, unless completed before the *act* of bankruptcy (*x*). *ff*

The estate and effects of the bankrupt being thus vested in his assignees, is sold, got in and converted into money by them, and a dividend is made whenever the court thinks fit, out of the proceeds, amongst the creditors rateably (*y*). In order to obtain a full discovery of the bankrupt's estate, the commissioner has power to examine him, and also his wife, under penalty of imprisonment if the answers be not satisfactory (*z*). But the oath formerly administered to them is now dispensed with (*a*). In the payment of dividends no preference is given on account of the nature of the debt,

Examination of
the bankrupt
and his wife.

All debts paid
rateably.

(*t*) Stat. 2 & 3 Vict. c. 29.

(*y*) Stat. 6 Geo. IV. c. 16, ss.

(*u*) *Whitmore v. Robertson*, 8 Mee. & Wels. 463, and other cases cited *ante*, p. 89, n. (*b*).

106, 107, 109; 5 & 6 Vict. c. 122, s. 27.

(*z*) Stat. 6 Geo. I, c. 16, ss. 36,

(*x*) Stat. 6 Geo. IV. c. 16, s. 108.

37.

(*a*) Stat. 8 & 9 Vict. c. 48.

whether judgment debt, bond debt, specialty or simple contract. In this respect the Court of Chancery, to which the jurisdiction in bankruptcy anciently belonged, and which now exercises an appellate jurisdiction (*b*), followed its rule that equality is equity. And if any trader, in contemplation of bankruptcy (*c*), should voluntarily and without pressure (*d*) pay or secure any one of his creditors, with a view of giving him a preference over the others, such payment or security will be void as against the assignees (*e*). The crown, however, may enforce payment of the entire debt of a bankrupt crown debtor, notwithstanding the bankrupt laws (*f*). And a judgment debt, if entered up one year at least before the bankruptcy, is, by the statute for extending the remedies of creditors, a charge in equity on all the bankrupt's real estate (*g*). The landlord of a bankrupt may also, notwithstanding an act of bankruptcy, distrain for his rent, not exceeding one year's rent accrued prior to the date of the fiat (*h*). The wages or salary of a clerk or servant of the bankrupt, for any time not exceeding three calendar months and not exceeding 30*l.* (*i*), and also the wages of any labourer or workman, not exceeding 40*s.*, may be ordered by the court to be paid in full (*k*). In case the proceeds of the bankrupt's estate should be more than sufficient to pay 20*s.* in the pound, interest at four *per cent.*, or at such other rate as may have been reserved or may be payable by law, is given to the creditors from the date of

Voluntary preference.

Crown debts.

Judgment.

Rent.

Wages.

Interest.

(*b*) Stat. 1 & 2 Will. IV. c. 56,
ss. 3, 37; 10 & 11 Vict. c. 102,
ss. 1, 2, 3.

(*c*) *Wheelwright v. Jackson*, 5
Taunt. 109.

(*d*) *Crosby v. Crouch*, 11 East,
256.

(*e*) *Rust v. Cooper*, Cowp. 629.

(*f*) *Anon.* 1 Atk. 262.

(*g*) Stat. 1 & 2 Vict. c. 110,
s. 13.

(*h*) *Ex parte Plummer*, 1 Atk.
103; stat. 6 Geo IV. c. 16, s. 74;
Briggs v. Sowry, 8 Mee. & Wels.
729, 739.

(*i*) Stat. 5 & 6 Vict. c. 122,
s. 28.

(*k*) Sect. 29.

the fiat; and the surplus, after this, is paid over to the bankrupt (*l*), who however in all events is entitled to an allowance out of the property varying with the amount of the dividend produced (*m*). And if the bankrupt or his friends shall, after he has passed his last examination, make an offer of composition, which nine-tenths in number and value of the creditors assembled at two successive meetings shall agree to accept, the Lord Chancellor may rescind the fiat (*n*). Allowance.
Composition.

If the bankrupt has duly surrendered and conformed to the bankrupt law, and has not lost certain specified amounts by gaming or speculating in the funds, and has not concealed, destroyed or altered books or papers, or made any false or fraudulent entries with intent to defraud his creditors, or concealed any part of his property, or permitted any false debt to be proved, or have afterwards known the same without disclosing the same to his assignees within one calendar month after such knowledge (*o*), he will be entitled to a certificate of conformity, by which he will be discharged from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat (*p*). Formerly the certificate was required to be signed by a given proportion of the creditors (*q*); but now, the court acting in the prosecution of the fiat, is the sole judge of any objections which may be made by any creditors against allowing the certificate; and the court may either allow the same or refuse or suspend the allowance thereof, or annex such conditions thereto as the The certificate.

(*l*) Stat. 6 Geo. IV. c. 16, s. 132. See *Bower v. Maris*, 1

Craig & Phil. 351.

(*m*) Stat. 5 & 6 Vict. c. 122,

ss. 41, 45.

(*n*) Stat. 6 Geo. IV. c. 16, ss.

133, 134; 1 & 2 Will. IV. c. 56,

s. 19.

(*o*) Stat. 5 & 6 Vict. c. 122,

s. 38.

(*p*) Stat. 5 & 6 Vict. c. 122,

s. 37.

(*q*) Stat. 6 Geo. IV. c. 16, s.

122.

justice of the case may require (*r*). Contracts or securities to induce any creditor to forbear opposition to the allowance of the certificate are void (*s*); and the creditor forfeits the treble value or amount of any money, goods or security so obtained (*t*).

Claims to which
the bankrupt
still remains
liable.

Notwithstanding the certificate, the bankrupt, it will be seen, still remains liable to all such claims as could not have been proved under the fiat. Thus if he were indebted on any contingency incapable of valuation, he will not be discharged from such debt; as if he should have covenanted to pay a debt in case another person, by whom it is payable at a future time, should make default (*u*). For the contingency of the other making default cannot be estimated by any known rules. Again, if any person have a claim against the bankrupt for unliquidated damages, by reason of any trespass or breach of contract, he cannot prove for such a claim, as the amount of damages to be recovered remains uncertain, till assessed by a jury (*x*). In such a case, therefore, the bankrupt's certificate is no discharge from his liability.

Rights of
uncertificated
bankrupt.

Until the bankrupt obtains his certificate, all the real and personal property which may descend, revert, or be devised or bequeathed or come to him, becomes vested in his assignees (*y*). But an uncertificated bankrupt may maintain an action for his personal labour performed after the issuing of the fiat (*z*), and he may also sue in

(*r*) Stat. 5 & 6 Vict. c. 122, s. 39.

(*s*) Sect. 40. *Bonâ fide* holders without notice may be prejudiced by this provision, which should have been copied from stat. 6 Geo. IV. c. 16, s. 125, as amended by stat. 5 & 6 Will. IV. c. 41.

(*t*) Stat. 5 & 6 Vict. c. 122, s. 41.

(*u*) *Thompson v. Thompson*, 2 N. C. 168; *Lane v. Burghart*, 3 Man. & Gr. 597.

(*x*) *Goodtitle v. North*, 2 Doug. 584. See *ante*, p. 60.

(*y*) Stat. 6 Geo. IV. c. 16, ss. 63, 64.

(*z*) *Silk v. Osborn*, 1 Esp. R. 140.

respect of contracts made with himself, and also in respect of any after-acquired property, if the assignees do not interfere (a). And if the bankrupt has been bankrupt before, or has compounded with his creditors, or has been discharged by any insolvent act, then, unless his estate shall produce, after all charges, sufficient to pay every creditor under the fiat fifteen shillings in the pound, his certificate, when obtained, shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children) shall vest in the assignees under the fiat, who shall be entitled to seize the same in like manner as they might have seized property, of which the bankrupt was possessed at the issuing of the fiat (b).

In case of previous bankruptcy, &c. effect of certificate.

All the proceedings in bankruptcy are entered of record in the Court of Bankruptcy (c); and no fiat, nor any adjudication of bankruptcy, or appointment of assignees, or certificate of conformity under such fiat, can be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy (d).

Entry of proceedings on record.

Notwithstanding all the changes which have recently been made in the bankrupt laws, the remedy afforded by them still remains expensive and inefficient. The sympathy shown by the legislature for unfortunate debtors does not appear to be so fully extended to a class much more numerous, and equally deserving of aid, namely, unfortunate creditors, creditors who in the course of their business have unhappily trusted reckless or dishonest

Inefficiency of the present bankrupt laws.

- | | |
|---|---|
| (a) <i>Webb v. Fox</i> , 7 T. Rep. 391; <i>Drayton v. Dale</i> , 2 Barn. & Cress. 293; <i>Crofton v. Poole</i> , 1 Barn. & Adol. 568. | (c) Stat. 1 & 2 Will. IV. c. 56, s. 13; 2 & 3 Will. IV. c. 114. |
| (b) Stat. 6 Geo. IV. c. 16, s. 127. | (d) Stat. 2 & 3 Will. IV. c. 114, s. 8. |

debtors. It is from the class of unfortunate creditors that the ranks of really unfortunate debtors are chiefly recruited. For if a trader unexpectedly fails in obtaining payment of the debts due to him, he may be obliged unexpectedly to disappoint others of the debts he owes. The law, however, has not yet imposed any effectual check on reckless or dishonest trading. No means have been afforded of immediately putting a stop to a career of dishonesty the moment it is discovered. The creditor who wishes to make a dishonest debtor a bankrupt, must first find means to serve him *personally* with notice requiring payment; and when this has been done, a ^{week} ~~fortnight~~ must still be occupied in the process of making him a bankrupt(e), during which time the bulk of his property may be realized and made away with. He has ample opportunity to wind up his own affairs, in spite of his creditors, with all the safety and assurance of an honest man. If at the expiration of the ^{week} ~~fortnight~~ his conscience will allow him to take a false oath, he may elude the law by swearing that he verily believes he has a good defence to the creditor's demand, without adducing any evidence of the grounds on which such belief is founded. If however he become bankrupt and surrender, he becomes entitled of right to freedom from arrest and imprisonment; and however bad his past conduct may have been, the court has no power to deprive him of this privilege. For all this the innocent suffer. The honest man is made a bankrupt, and endures the opprobrium which the misconduct of others has cast upon that name, because it is known that no fraud on his part will prevent all that he has from being effectually squeezed out of him; whilst the known rogue makes his own terms, and is let off with a fraudulent and insufficient composition. It is the interest of his creditors to accept the composition, and wink at the fraud, rather than incur the expense and risk of assert-

ing their just claims under the present system of bankruptcy. It is to be hoped that the earnest remonstrances of the trading community will at length secure the attention of the legislature (*f*). Those who practically know and feel the evils of the present system are surely entitled to consideration. And if some of the remedies they suggest should be considered stringent, let it be remembered that they are proposed by men themselves within the bankrupt laws, and who well know that possibly, by adverse fortune, they may become individually subject to their operation.

(*f*) A statement will be found in appendix A. of some of the measures proposed by the Metropolitan Committee appointed at public meetings of merchants,

bankers, and traders of the city of London, for the purpose of obtaining an amendment of the law of bankruptcy and insolvency.

CHAPTER V.

OF INSOLVENCY.

INSOLVENCY, strictly speaking, means a general inability to meet pecuniary engagements (*a*). But the term is very commonly and conveniently applied to the means of getting rid of such engagements afforded by certain acts of parliament which have passed for the relief of insolvent debtors; and in this latter sense the term is here intended to be used.

Stat. 1 & 2 Vict.
c. 110.

The principal act for the relief of insolvent debtors in England is the statute 1 & 2 Vict. c. 110, the former sections of which are, however, occupied in abolishing arrest on mesne process in civil actions, and in extending the remedies of judgment creditors against the property of their debtors. So far as the act relates to insolvent debtors it is, for the most part, a reprint, with some important additions, of a previous statute for the same purpose (*b*), by which the laws then existing on the subject were amended and consolidated. The relief afforded to the debtor is his discharge from prison; and the act accordingly only applies to persons in actual custody within the walls of a prison in England. Any such person in custody upon any process whatsoever, for or by reason of any debt, damages, costs, sum or sums of money, or in consequence of contempt of any court whatsoever for non-payment of money or costs, taxed or untaxed, may at any time within the space of fourteen days next after the commencement of his actual custody,

Discharge from
prison.

(*a*) *Biddlecombe v. Bond*, 4 Adol. & Ell. 332.

continued and amended by stat. 11 Geo. IV. & 1 Will. IV. c. 38.

(*b*) Stat. 7 Geo. IV. c. 57,

or afterwards by permission of the court, apply by petition to the Court for the Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the act (c). In the country the petition is now referred for hearing to the County Court of the district within which the insolvent is in custody (d). The insolvent himself was formerly the only person who could put the machinery of the act in motion; but now the creditor at whose suit the prisoner is committed to prison or charged in execution may, if not satisfied within twenty-one days next after such prisoner shall be so committed or charged in execution, himself petition the court for his share of the relief (e), which consists in the real and personal estate and effects of the prisoner being vested in the provisional assignee of the court for the benefit of his creditors.

On the filing of the petition either of the debtor or of the creditor, a vesting order, as it is termed, is made by the court. By this order all the real and personal estate and effects of the prisoner, both within this realm and abroad (except his wearing apparel, bedding and other such necessities of himself and his family, and his working tools and implements, not exceeding in the whole the value of twenty pounds), and all the future estate to which he may become entitled until his final discharge, are vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England (f). The court may subsequently appoint any proper person or persons to be assignees of such

Vesting order.

Assignees.

(c) Stat. 1 & 2 Vict. c. 110, s. 35.

(d) Stat. 10 & 11 Vict. c. 102, s. 10.

(e) Sect. 36. In this case, however, the Insolvent Court has no adequate means of compelling

the prisoner to file a schedule of his property, *Hollis v. Bryant*, 12 Sim. 492, 501.

(f) Stat. 1 & 2 Vict. c. 110, s. 37; *Ford v. Dabbs*, 5 Man. & Gr. 309.

estate and effects, in whom the same will accordingly vest on the acceptance of the appointment being signified by him or them to the court (*g*). The estate and effects of the prisoner are then sold and converted into money by the assignees in the manner directed by the act (*h*). And the court has power to order that any property of the prisoner may be mortgaged, instead of being sold, if it shall appear to the court that his debts can be discharged by such means (*i*). If the insolvent be a beneficed clergyman, the assignees may obtain a sequestration of the profits of the benefice for the payment of his debts (*k*). And if the insolvent be or have been an officer under government, or in the service of the East India Company, a portion of his pay, half-pay, salary, emoluments or pension, may, with the written consent of the chief officer of the department to which he belongs or may have belonged, be ordered to be paid to the assignees (*l*). The produce of the insolvent's estate is then divided by the assignees rateably amongst the creditors (*m*). And if any prisoner shall before or after his imprisonment, being in insolvent circumstances, voluntarily convey, charge or make over any of his estate to or in trust for any creditor or creditors, every such transaction is declared to be fraudulent and void as against the assignees, if made within three months before the commencement of the party's imprisonment, or with the view or intention on his part of petitioning the court for his discharge under the act (*n*).

Beneficed clergyman.

Officer.

Voluntary preference.

The schedule.

Within fourteen days next after the making of the vesting order, or within such further time as the court

(*g*) Stat. 1 & 2 Vict. c. 110, s. 45.

(*h*) Sect. 47. See *Wright v. Maumder*, 4 Beav. 512.

(*i*) Sect. 48.

(*k*) Sect. 55.

(*l*) Sect. 56.

(*m*) Sect. 62.

(*n*) Sect. 59. See *Harris v. Lloyd*, 6 Beav. 426; *Jackson v. Thompson*, 2 Q. B. 887; 3 Man. & Gr. 621.

shall think reasonable, a schedule is required to be delivered in to the court, signed by the prisoner, containing a full description of his name, trade or profession, place of abode, debts and property of every description (*o*). Immediately after the filing of this schedule, a time and place are appointed by the court for the prisoner to be brought up to be dealt with according to the act (*p*), of which due notice is given to the creditors (*q*). His schedule is then examined into on oath by the court; and any creditor may oppose his discharge, and for that purpose may put such questions to the prisoner, and examine such witnesses, as the court shall think fit (*r*). After such examination the court is then empowered, upon the prisoner swearing to the truth of his schedule, and executing the warrant of attorney to be mentioned afterwards, to adjudge that such prisoner shall be discharged from custody, and entitled to the benefit of the act as to the several debts and sums of money mentioned in the schedule, due or claimed to be due, at the time of making the vesting order, from the prisoner to the persons named in his schedule, or for which such persons shall have given him credit before the time of making such vesting order, and which were not then payable, and as to the claims of all other persons, not known to the prisoner at the time of the adjudication, who may be indorsees or holders of any negotiable security set forth in the schedule (*s*). The discharge may, in the discretion of the court, either be immediate, or may be postponed for six months (*t*), and in certain cases of flagrant misconduct it may be postponed for any period not exceeding three years (*u*).

Discharge from custody.

The insolvent being thus discharged is free from any Effect of discharge.

(*o*) Sect. 69.

(*p*) Sect. 70.

(*q*) Sect. 71.

(*r*) Sect. 72.

(*s*) Sect. 75. *Leonard v. Baker*,
15 Mee. & Wels. 202.

(*t*) Sect. 76.

(*u*) Sects. 77, 78.

Warrant of attorney to be executed by prisoner.

no.

future imprisonment, and his property is also free from execution, at the suit of his creditors, for the debts mentioned in the schedule(*x*). And the costs of actions and suits(*y*), and the claims of annuity creditors(*z*), may be comprised in such discharge. The discharge, however, is not, like that of bankruptcy, final and complete; for before any adjudication is made, the prisoner is required to execute a warrant of attorney, authorizing the entering up of a judgment against him in one of the superior courts at Westminster, in the name of the assignee or assignees, for the amount of the prisoner's unsatisfied debts as stated in the schedule. And if at any time it should appear to the satisfaction of the court that the prisoner is of ability to pay such debts, or any part thereof, or that he is dead leaving assets for that purpose, the court may permit execution to be taken out upon the judgment for such sum as it may order, such sum to be distributed rateably amongst the creditors(*a*).

Insolvency under stat. 5 & 6 Vict. c. 116.

after acquired liability by fraud

Under certain circumstances an insolvent may now, by recent acts of parliament, obtain as complete a discharge from his debts as if he had become bankrupt(*b*). The acts, however, only apply to such persons as have become indebted without any fraud, or gross or culpable negligence. Accordingly, no person is allowed to take the benefit of such acts if his debts have been contracted by any manner of fraud or breach of trust, or any prosecution whereby he has been convicted of any offence, or without having, at the time of becoming indebted, a reasonable or probable expectation of being able to pay the debts; or if such debts were contracted by reason of any judgment in any proceeding for breach of the

(*x*) Sects. 90, 91.

88 and 89.

(*y*) Sect. 79.

(*b*) Stats. 5 & 6 Vict. c. 116;

(*z*) Sect. 80. See *Bennett v. Burton*, 12 Ad. & Ell. 657.

7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

(*a*) Sect. 87. See also sects.

revenue laws ; or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out of a fiat in bankruptcy, or malicious trespass (c). With these exceptions, any person indebted, not being a trader within the bankrupt laws, or being such trader, but owing debts amounting in the whole to less than 300*l.*, may, whether he shall have already been in prison or not (d), apply for the protection⁷⁴ of his person from process, on making a full disclosure and surrender of all his estate and effects for payment of his debts. The application is now made to the Court for the Relief of Insolvent Debtors (e). But if the petitioner shall not have resided for the last six calendar months within twenty miles of London, but shall have resided for that time within the district of a County Court, application must then be made to such County Court (f). The whole estate and effects of the insolvent are then vested in the provisional assignee of the Insolvent Court, or in the clerk of the County Court, as the case may be, for the benefit of all the creditors rateably (g). But the wearing apparel, &c. of the petitioner and his family, not exceeding the value of 20*l.*, may be excepted, as in the other Insolvent Act, provided such excepted articles, and the values thereof, be fully and truly described (h). With the exception of the warrant of attorney given by the prisoner under the other Insolvent Act, the provisions of these acts are generally similar to those of that act.

In the reign of George III. an act was passed for the discharge of debtors in execution upon any judgment

Stat. 48 Geo. 3,
c. 123.

- (c) Stat. 5 & 6 Vict. c. 116, ss. 6, 8.
 s. 4; 7 & 8 Vict. c. 96, s. 24. (f) *Ibid.* s. 6.
 (d) Stat. 7 & 8 Vict. c. 96, s. (g) Stat. 5 & 6 Vict. c. 116,
 6; 10 & 11 Vict. c. 102, s. 7. s. 7; 10 & 11 Vict. c. 102, s. 5.
 (e) Stat. 10 & 11 Vict. c. 102, (h) Stat. 7 & 8 Vict. c. 96, s. 9.

for any debt or damages not exceeding 20*l.*, exclusive of costs (*i*). But as it is now provided that no person shall be taken or charged in execution upon any judgment in any action for the recovery of any debt, wherein the sum recovered shall not exceed 20*l.*, exclusive of costs (*k*), this act may now be considered as almost obsolete.

(*i*) Stat. 48 Geo. III. c. 123. { (*k*) Stat. 7 & 8 Vict. c. 96, s.
See *Tolson v. Dykes*, 1 Phillips, { 57.
439.

CHAPTER VI.

OF INSURANCE.

HAVING now considered, though very briefly, the subject of debts generally, there remain certain debts, payable on contingencies, which deserve a separate notice, namely, debts arising under contracts to insure, effected by policies of insurance. A policy of insurance, or assurance, is the name given to the instrument by which a contract to insure is entered into; and a contract to insure is a contract to indemnify against a loss which may arise on the happening of some event, or, in other words, a contract that, on the happening of ~~such~~ ^{some} event, the insurer shall pay to the party insured a sum of money equivalent to the loss he may have sustained. The most usual kinds of insurance are, insurance of *lives*, insurance against loss by *fire*, and insurance of *ships* and their cargoes against the perils of the seas.

Policy of insurance.

S.E. 11-1

And first, as to life insurance. The advantages of life insurance are now so well known that there is no occasion to dilate upon them. By payment of a small annual premium during the life insured, a sum of money may be secured at the decease of the party, applicable to the payment of his debts, for a provision for his family, or any other purposes. But as the insurance of lives and other events, in which the person insured had no interest, was found to introduce a mischievous kind of gaming, it was enacted, in the early part of the reign of George III., that no insurance should be made on the life of any person, or on any other event whatsoever, wherein the person for whose use and benefit, or on

Life insurance.

Insurances on lives in which the insured has no interest void.

whose account such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every such assurance shall be null and void to all intents and purposes whatsoever (*a*); and that it shall not be lawful to make any policy on the life of any person, or other event, without inserting in the policy the person's name interested therein, or for whose use or benefit, or on whose account such policy is made (*b*); and that in all cases where the insured hath an interest in such life or event, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or other event (*c*). But this act does not extend to insurances *bonâ fide* made on ships, goods or merchandizes (*d*), with respect to which provisions have been made by another act of parliament (*e*). Every person is considered to have a sufficient interest in the duration of his own life to sustain his own insurance of it; but if he should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors; and no provision to the contrary contained in the policy of insurance will be of any avail (*f*). The assignee of a person who has insured his own life is not required by the above mentioned statute to have any interest in the life of such person, for the statute makes no mention of the assignment of policies (*g*). A creditor has an insurable interest in the life of his debtor to the extent of his debt; but if the debt should be discharged from any other source, the policy will thenceforth be void for want of interest (*h*). This strict law is not however

A person may insure his own life.

A creditor has an insurable interest in the life of his debtor.

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| (<i>a</i>) Stat. 14 Geo. III. c. 48, s. 1. | 194, reversing <i>Bolland v. Disney</i> , |
| (<i>b</i>) Sect. 2. | 3 Russ. 351; see <i>Clift v. Schwabe</i> , |
| (<i>c</i>) Sect. 3. | 3 C. B. 437. |
| (<i>d</i>) Sect. 4. | (<i>g</i>) <i>Ashley v. Ashley</i> , 3 Sim. |
| (<i>e</i>) Stat. 19 Geo. II. c. 37. | 149. |
| (<i>f</i>) <i>Amicable Association Society v. Bolland</i> , 4 Bligh, N. S. | (<i>h</i>) <i>Godsall v. Boldcro</i> , 9 East, 72; S. C. 2 Smith's Leading |

usually taken advantage of by the assurance offices, who generally pay the sums insured without any inquiry as to the extent of the interest of the party insured in the life on which the insurance has been effected (*i*).

An interest as trustee is also sufficient to support a life insurance (*k*). But a father has not such an interest in the life of his son as to warrant an insurance of it for his own benefit (*l*).

Trustee.

Father and son.

Insurance against fire is a contract to indemnify against loss by fire, and is usually renewed from year to year on payment of a premium. The person who effects such an insurance must have an interest in the property insured, and he cannot recover beyond the extent of his interest; neither can he assign his policy without the consent of the insurers (*m*). When the building insured is situate within the limits of the Metropolitan Building Acts, any person interested may procure the insurance money, in case of fire, to be laid out in repairs or rebuilding (*n*). A covenant to insure any building within such limits, is therefore tantamount to a covenant to repair to the extent of such insurance, and if entered into by a lessee in his lease, will *run with the land* so as to be binding on the assignee of the lease (*o*).

Fire insurance.

The insurance of ships and their cargoes from the perils of the seas is a matter belonging rather to mercantile law than to the department of conveyancing.

Insurance of ships.

Cases, 157; see, however, *Humphrey v. Arabin*, 1 Lloyd & Goold, Cas. temp. Plunkett, 322.

(*i*) Lloyd & Goold, Cas. temp. Sugden, 291.

(*k*) *Tidswell v. Angerstein*, Peake, N. P. Cases, 151.

(*l*) *Halfjord v. Kymer*, 10 Barn. & Cress. 724.

(*m*) *Lynch v. Dalzell*, 4 Bro.

Parl. Cas. 431; *Saddlers' Company v. Badcock*, 2 Atk. 554.

(*n*) Stat. 14 Geo. III. c. 78, s. 83. This section is not repealed by stat. 7 & 8 Vict. c. 84, Schedule (A).

(*o*) *Vernon v. Smith*, 5 Barn. & Ald. 1; see Principles of the Law of Real Property, 320.

In this kind of insurance, as well as in the others, an interest in the property insured must generally belong to the party effecting the insurance, if the ship be a British vessel, or the goods be laden on board any such vessel (*p*). Full information on this subject will be found in Park on Insurance, Abbott on Shipping, and in the chapter on maritime insurance in the late J. W. Smith's admirable Compendium of Mercantile Law. Connected with maritime insurance are *bottomry* and *respondentia*. Bottomry is an agreement by which a vessel is hypothecated or pledged by the owner for the payment, (in the event of her voyage terminating successfully,) of money advanced to him for the use of the vessel together with interest, which interest, in consideration of the risk incurred, is generally far beyond five per cent., formerly the legal rate. Respondentia is a somewhat similar contract with respect to the cargo, except that the borrower only is responsible in the event of the safe termination of the voyage, the lender having no lien on the goods (*q*). These contracts appear to be of little importance since the relaxation of the usury law.

Bottomry.

Respondentia.

(*p*) Stat. 19 Geo. II. c. 37, s. 1.

(*q*) 2 Black. Com. 457.

CHAPTER VII.

OF ARBITRATION.

INSTEAD of the ultimate remedy of an action at law or suit in equity, recourse is sometimes had for the settlement of disputes to the more amicable expedient of arbitration. And in some transactions, especially in articles of co-partnership between traders, it is usual to stipulate that if any dispute shall arise, it shall be referred to the determination of two indifferent persons as arbitrators, or of their umpire, who is usually and very properly required to be chosen by the arbitrators before they proceed to take the subject in question into consideration (a). And it is agreed that the award in writing of the arbitrators, or of their umpire in case of their disagreement, shall be binding and conclusive on all parties. It is generally also further provided, that in case either party should neglect or refuse for a given time to appoint an arbitrator, the arbitrator chosen by the other party may make an award, which shall be binding on both. It is also usual to provide, that the reference or submission to arbitration shall be made a rule of the Court of Queen's Bench, according to the directions of a statute of Will. III. to be afterwards noticed.

Agreements to refer to arbitration.

As the courts of law and equity have full jurisdiction on all questions arising out of agreements of any kind, it follows that they retain a jurisdiction over matters which the parties themselves have agreed should be referred to arbitration (b). Notwithstanding therefore an

Jurisdiction of the courts over matters agreed to be referred to arbitration.

(a) See *Bates v. Cooke*, 9 Barn. & Cress. 407, 408.

(b) *Wellington v. Mackintosh*, 2 Atk. 569.

agreement to refer disputes to arbitration, either party may bring the matter into court (*c*); although if the agreement should contain an express covenant not to sue, and especially if arbitrators be actually named, it seems that such covenant may be effectually pleaded in bar to any suit in equity (*d*). And without such a covenant, the circumstance of the parties having agreed to refer to arbitration, will induce a court of equity to pause before granting to any of them summary relief on a point which they have expressly agreed to settle by amicable means (*e*). If however one of the parties should, notwithstanding his agreement, refuse to name an arbitrator, the Court of Chancery will not entertain a bill to compel him to do so (*f*), neither will it substitute the master for the arbitrators (*g*); for the court acts only when it has it in its power itself to execute the whole contract in the terms specifically agreed upon (*h*).

Reference by
rule of court.

The reference of disputes to arbitration appears to have been early adopted by the courts of law, with the consent of the parties to an action, in cases where the matter in dispute could be more conveniently settled in this mode. A verdict was taken for the plaintiff by consent, subject to the award of an arbitrator agreed upon by the parties, and the reference was made a rule of court. This plan is still continually adopted. The arbitrators and the parties to the reference by this means become subject to the jurisdiction of the court, which has power to set aside any award which may appear to have been given unjustly or through mistake of the law;

(*c*) *Waters v. Taylor*, 15 Ves. 19.
10, 18; *Mexborough v. Bower*, 7
Beav. 127, 132.

(*d*) *Halfhide v. Fenning*, 2
Bro. C. C. 336; *Dinsdale v. Ro-*
binson, 2 Jones & Lat. 58, 92.

(*e*) *Waters v. Taylor*, 15 Ves.

(*f*) *Wilks v. Davis*, 3 Meriv.
507.

(*g*) *Agar v. Macklew*, 2 Sim.
& Stu. 418.

(*h*) *Gervais v. Edwards*, 1 Dru.
& War. 80.

or if the award be valid, its performance may be enforced under the penalty of imprisonment for contempt of court. In order to extend the benefits of this mode of submission to arbitration, to all cases of controversies between merchants and traders or others concerning matters of account or trade or other matters, an act of parliament was passed in the reign of William the Third, intituled “An Act for determining differences by Arbitration (i).” This act empowers all merchants and traders and others desiring to end by arbitration any controversy, for which there is no other remedy but by personal action or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons shall be made a rule of any of her majesty’s courts of record which the parties shall choose. And it provides, that in case of disobedience to the arbitration or umpirage to be made pursuant to such submission, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court. And the process to be issued accordingly shall not be stopped or delayed in its execution by any order, rule, command or process of any other court, either of law or equity, unless it shall be made ^{to} appear on oath to such court that the arbitrators or umpire misbehave themselves, and that such award, arbitration or umpirage was procured by corruption or other undue means. It is also further provided (j), that any arbitration or umpirage procured by corruption or undue means shall be judged void, and be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage

Act for determining differences by arbitration.

(i) Stat. 9 & 10 Will. III. c. 15.

(j) Sect. 2.

is made and published to the parties. The Court of Chancery is a court of record within the meaning of this act (k).

Revocation of submission.

Previously to a recent statute either party might have revoked his submission, and thus determined the authority of the arbitrators ; and this may still be done, if the submission relate to criminal matters, which are not within the statute (*l*). But it is now enacted (*m*), that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court or judge's order or order of nisi prius in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of her majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge (*n*). And the arbitrator or umpire is empowered and required to proceed with the reference notwithstanding any such revocation, and to make such award although the person making such revocation shall not afterwards attend the reference. And the court, or any judge thereof, may from time to time enlarge the term for any such arbitrator making his award (*o*). The court, or any judge, is also empowered under any such reference, by rule or order to command the attendance and examination of witnesses, or the production of any documents (*p*). And if in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be

**Power to en-
large the time
for making the
award.**

Attendance and examination of witnesses.

(k) *Heming v. Swinnerton*, 2 Phil. 79.

(l) 2 Wms. Saund. 133 e, n.
(d); *Rex v. Bardell*, 5 Ad. & Ell.
619; S. C. 1 Nev. & P. 74.

(m) Stat. 3 & 4 Will. IV. c. 42,
s. 39.

(n) See *Scott v. Van Sandau*,
1 Q. B. 102.

(o) *Parbery v. Newnham*, 7 Me. & Wels. 378.

(p) Stat 3 & 4 Will. IV. c. 42,
s. 40.

made a rule of court, it shall be ordered or agreed that, *like 14th Dec. 1899*
 the witnesses upon such reference shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, is authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and any witness wilfully and corruptly giving false evidence shall be deemed guilty of perjury, and shall be prosecuted and punished accordingly (*q*). The provisions of this act appear to apply to courts of equity as well as courts of law (*r*).

The authority of arbitrators is liable to be determined not only by a revocation of the submission, but also by the death of either of the parties previously to the making of the award (*s*). In order to obviate this inconvenience, it is now usual to insert in the order or rule of court, by which reference is made to arbitration, a provision that the death of either of the parties shall not operate as a revocation of the authority of the arbitrators, but that the award shall be delivered to the executors or administrators of the parties, or either of them, in case of their or his decease (*t*). And the same stipulation may be effectually made in a submission to arbitration by private agreement (*u*). The bankruptcy of either party is not a determination of a submission to arbitration (*x*).

Death of either party.

Bankruptcy.

When no time is limited for the making of the award, it must be made within a reasonable time (*y*); but if a

Time for making the award.

(*q*) Sect. 41.

Saund. 133 d, n. (*d*).

(*r*) *Oliver v. Latham*, 1 Phil. 163.

(*u*) *Macdougall v. Robertson*, 2 You. & Jerv. 11; S. C. 4 Bing. 435; 1 Moo. & P. 147.

(*s*) *Cooper v. Johnson*, 2 Barn. & Ald. 394; *Brooke v. Mitchell*, 6 Mee. & Wels. 473.

(*x*) *Hensworth v. Bryan*, 1 C. B. 131.

(*t*) *Tyler v. Jones*, 3 Barn. & Cress. 144; *Prior v. Hembrow*, 8 Mee. & Wels. 873; 2 Wms.

(*y*) *Macdougall v. Robertson*, ubi supra.

Enlargement of
time.

given time be limited, the award must be made within that time, unless the time for making it be enlarged (*z*). And if the award is required to be made and ready to be delivered to the parties by a certain day, it will be considered as ready to be delivered if it be made (*a*), unless the arbitrators should fail to deliver it to either of the parties on request made for that purpose on the last day (*b*). The submission to arbitration frequently contains a power for the arbitrators or umpire to enlarge the time for making the award; and in this case the time may be enlarged from time to time (*c*) by such arbitrators or umpire (*d*), provided the enlargement be made on or before the expiration of the time originally limited for making the award (*e*). And if the submission be made a rule of court, then, whether the arbitrators or umpire have power to enlarge the time or not (*f*), the court, or a judge thereof, has power to enlarge the time under the provisions of the statute above mentioned (*g*). And should no enlargement be formally made, yet the parties may, by continuing their attendance on the reference, or by recognising the proceedings under it, virtually empower the arbitrators or umpire to make a valid award subsequently to the time originally limited (*h*).

Attendance of
the parties.

In proceeding in the business of the arbitration, the arbitrators are bound to require the attendance of the

(*z*) 1 Wms. Saund. 327 a, n.
(3).

(*a*) *Bradsey v. Clyston*, Cro.
Car. 541.

(*b*) *Brooke v. Mitchell*, 6 Mee.
& Wels. 473.

(*c*) *Poynce v. Deakle*, 1 Taunt.
509; *Barrett v. Parry*, 4 Taunt.
658.

(*d*) See *Dimsdale v. Robertson*,
2 Jones & Lat. 58.

(*e*) See *Reid v. Fryatt*, 1 M.
& Sel. 1; *Mason v. Wallis*, 10 B.
& Cress. 107.

(*f*) *Parbery v. Newnham*, 7
Mee. & Wels. 378. See however
per Tindal, C. J. in *Lambert v.*
Hutchinson, 2 Man. & Gr. 858.

(*g*) Stat. 3 & 4 Will. IV. c. 42,
s. 39.

(*h*) *Rex v. Hill*, 7 Price, 636.

parties, for which purpose notice of the meetings of the arbitrators should be given to them (*i*). But if either party neglect to attend either in person or by attorney after due notice, the arbitrators may proceed without him (*k*). In taking the evidence the arbitrators are at liberty to proceed in any way they please, if the parties have due notice of their proceedings, and do not object before the award is made (*l*). But in order to obviate any objection, they ought to proceed in the admission of evidence according to the ordinary rules of law (*m*). The award when made must be both certain and final. Thus if the award be that one party enter into a bond with the other for his quiet enjoyment of certain lands, this award is void for uncertainty; for it does not appear in what sum the bond should be (*n*). With regard to certainty, however, the rule of law is *id certum est quod certum reddi potest*, and therefore an award that one of the parties should pay the costs of an action is good without fixing the amount of the costs, for that may be ascertained by the taxing officer (*o*). On the question of finality many cases have arisen. If the arbitrators be *empowered* to decide all matters in difference between the parties, the award will not necessarily be wanting in finality for not deciding on all such matters, unless it appear to have been *required* that all such matters should be determined by the award (*p*). If the award reserve to the arbitrators (*q*), or give to any other person (*r*), or to one of the parties (*s*), any further au-

Mode of proceeding.

Award must be certain and final.

(*i*) *Anon.* 1 Salk. 71.

Ry. 433; 2 Wms. Saund. 293 b,

(*k*) *Harcourt v. Ramsbottom*, 1 Jac. & Walk. 512; *Scott v. Van Sandau*, 6 Q. B. 237.

n. (*u*).

(*p*) *Wrightson v. Bywater*, 3 Me. & Wels. 199; 1 Wms. Saund.

(*l*) *Ridout v. Pye*, 1 Bos. & P. 91.

32 a, n. (*a*).

(*q*) *Manser v. Heaver*, 3 Bar. & Adol. 295.

(*m*) *Attorney-General v. Davison*, McClel. & Y. 160.

(*r*) *Tomlin v. Mayor of Fordwich*, 5 Ad. & Ell. 147.

(*n*) *Samon's case*, 5 Rep. 77 b.
(*o*) *Cargey v. Aitcheson*, 2 B. & Cress. 170; S. C. 3 Dowl. &

(*s*) *Glover v. Barrie*, 1 Salk. 71.

thority or discretion in the matter, it will be bad for want of finality. And if the award be that any stranger to the reference should do an act, or that money should be paid to, or any other act done in favor of, a stranger, such award will be void (*t*). An award, however, may be partly good and partly bad, provided the bad part is independent of and can be separated from that which is good (*u*). But if, by reason of the invalidity of part of the award, one of the parties cannot have the advantage intended for him as a recompense for that which he is to do, according to that part of the award which would otherwise be valid, the whole will be void (*x*). If it should appear on the face of the award that the arbitrators, intending to decide a point of law, have fallen into an obvious mistake of the law, the award will be invalid (*y*). But where subjects involving questions both of law and fact are referred to arbitration, the arbitrators may make an award according to what they believe to be the justice of the case, irrespective of the law on any particular point (*z*).

Setting aside
the award.

When the submission to arbitration is not made the rule of any other court (*a*), the Court of Chancery, according to the ordinary principles of equity, has power to set aside the award for corruption or other misconduct on the part of the arbitrators, or if they should be mistaken in a plain point of law (*b*). If the submission be made a rule of court under the above-mentioned statute of Will. III. (*c*), the court of which it is made a

(*t*) *Cooke v. Whorwood*, 2 Saun. 337; *Adam v. Statham*, 2 Lev. 235; *Fisher v. Pimbley*, 11 East, 188.

(*u*) *For v. Smith*, 2 Wils. 267; *Aitcheson v. Cargey*, 2 Bing. 199.

(*r*) 2 Wms. Saund. 293 b, n. (1).

(*y*) *Ridout v. Pain*, 3 Atk. 494;

Richardson v. Nourse, 3 Barn. & Ald. 237.

(*z*) *Re Badger*, 2 Barn. & Ald. 691; *Young v. Walker*, 9 Ves. 364.

(*a*) *Nichols v. Roe*, 3 Myl. & Keen, 431.

(*b*) *Ridout v. Pain*, 3 Atk. 491.

(*c*) Stat. 9 & 10 Will. III. c. 15,

rule has power to set aside the award, not only on the grounds of corruption or undue practice mentioned in the act, but also for mistakes in point of law (*d*); and no other court has a right to entertain any application for this purpose (*e*). The application to set aside the award must, however, be made within the time limited by the act (*f*). But although the time limited by that statute may have expired, yet, if there be any defect apparent on the face of the award, the court will not assist in carrying it into effect by granting an attachment for its nonperformance (*g*). If the submission to arbitration be made by rule or order of the court in any cause independently of the statute, the court still retains its ancient jurisdiction of setting aside the award on account either of the misconduct of the arbitrators, or of their mistake in point of law (*h*). In analogy, however, to the practice under the statute of Will. III., the court in ordinary cases requires application for setting aside the award to be made within the time limited by that statute (*i*); but upon sufficient grounds it will grant such an application, though made after the expiration of that time (*k*).

If an umpire be appointed, his authority to make an award commences from the time of the disagreement of the arbitrators (*l*), unless some other period be expressly

(d) *Zachary v. Shepherd*, 2 T. Rep. 781; *Lowndes v. Lowndes*, 1 East, 276, overruling *Anderson v. Coreter*, 1 Str. 301; see 1 Wms. Saund. 327 d, n. (s).

(e) Stat. 9 & 10 Will. III. c. 15, s. 2; *Nichols v. Roe*, 3 Myl. & Keen, 431.

(f) *Lowndes v. Lowndes*, 1 East, 276.

(g) *Pedley v. Goddard*, 7 T.

Rep. 73.

(h) *Lucas v. Wilson*, 2 Burr.
701.

(i) *Macarthur v. Campbell*, 5 Barn. & Adol. 518.

(k) *Rawsthorn v. Arnold*, 6 Barn. & Cress. 629; S. C. 9 Dow. & Ry. 556.

(1) *Smailes v. Wright*, 3 Man. & Sel. 559; *Sprigens v. Nash*, 5 Man. & Sel. 193.

fixed; and if, after the disagreement of the arbitrators, he make an award before the expiration of the time given to the arbitrators to make their award, such award will nevertheless be valid (*m*). The umpire must be chosen by the arbitrators in the exercise of their judgment, and must not be determined by lot (*n*), unless all the parties to the reference consent to his appointment by such means (*o*). In order to enable him to form a proper decision, he ought to hear the whole evidence over again (*p*), unless the parties should be satisfied with his deciding on the statement of the arbitrators (*q*). And the whole matter in difference must be submitted to his decision, and not some particular points only on which the arbitrators may disagree (*r*).

Award for payment of money creates a debt.

An award for the payment of money creates a debt from one party to the other, for which an action may be brought in any court of law (*s*), and which will be sufficient to support a fiat in bankruptcy (*t*). But when the award is made a rule of court, its performance may, as we have seen (*u*), be enforced by attachment. And where the reference is made a rule of the Court of Chancery (*x*), or where the award requires any act to be done which cannot be enforced by an action at law (*y*), equity will decree a specific performance.

(*m*) *Sprigens v. Nash*, ubi sup.

(*n*) *In re Cassell*, 9 Barn. & Cress. 624; *Ford v. Jones*, 3 Barn. & Adol. 218.

(*o*) *Re Jamieson*, 4 Adol. & Ell. 945.

(*p*) *Re Salkeld*, 12 Ad. & Ell. 767.

(*q*) *Hall v. Lawrence*, 4 T. Rep. 589.

(*r*) *Tollit v. Saunders*, 9 Price, 612.

(*s*) 2 Wms. Saund. 62 a, n. (5).

(*t*) *Ex parte Lingard*, 1 Atk. 241.

(*u*) *Ante*, p. 139.

(*x*) *Marquis of Ormond v. Kynnersley*, 2 Sim. & Stu. 15; see *Salmon v. Osborn*, 3 My. & Keen, 429.

(*y*) *Hall v. Hardy*, 3 P. Wms. 190.

The award of arbitrators or of an umpire, though indented and under hand and seal, is not a deed unless delivered as such (z). It is however now subject to the same stamp duty as an ordinary deed (a). Award under seal not a deed.
Stamp.

(z) *Brown v. Wawser*, 4 East, 584.

(a) Stat. 55 Geo. III. c. 184, schedule, part 1, tit. Award.

PART III.

OF INCORPOREAL PERSONAL PROPERTY.



CHAPTER I.

OF PERSONAL ANNUITIES, STOCKS AND SHARES.

IN addition to goods and chattels in possession, which have always been personal property, and to debts which have long since been considered so, there exist in modern times several species of incorporeal personal property, to which we now propose to direct our attention. These species of property are certainly not *choses in possession*, neither yet are they like debts strictly *choses in action*, though often classed as such. In analogy, therefore, to the well-known division of real estate into corporeal and incorporeal, we have ventured to place these kinds of property together into a class to be denominated *incorporeal personal property*. A debt no doubt is also incorporeal, but it is still well characterized by its ancient name of a *chose in action*.

Personal annuity.

The first kind of incorporeal personal property which we shall mention is a *personal annuity*. This kind of property is not indeed of so modern an origin as some of those which we shall hereafter mention. It consists of an annual payment, not charged on real estate; but it may nevertheless be limited to the heirs, or the heirs of the body of the grantee. In former times it was doubted whether an annuity was not a mere *chose in action*, and therefore incapable of assignment (*a*); but this objection has long been overruled. When limited to

(*a*) Co. Litt. 144 b, n. (1).

the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property (*b*), and will pass by his will under a bequest of all his personal estate (*c*). When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a *tene-ment* within the meaning of the statute *De donis conditionalibus* (*d*). The grantee has merely a fee simple *conditional* on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *De donis* (*e*), or as a copyholder would now take in manors where there is no custom to entail (*f*). When the grantee has issue, he may therefore alien the annuity in fee simple by a mere assignment; but should he die without issue, the annuity will fail. A personal annuity given to a man *for ever* will devolve on the executor, and not on the heir of the grantee (*g*).

The next kind of incorporeal personal property to be considered is stock in the public funds, or bank annuities. Previously to the Revolution in 1688 there was no funded debt properly so called; although King Charles I. and King Charles II. both found occasion to raise money by the grant of annuities in fee simple chargeable on particular branches of the revenue. These annuities, not being payable out of real estate, appear to have been the first instances of personal annuities limited to the grantees and their heirs, and they gave occasion to those law suits by which the legal nature and incidents of personal annuities have been deter-

Stock or bank annuities did not exist before the Revolution.

(*b*) *Earl of Stafford v. Buckley*, 2 Ves. sen. 171; *Radburn v. Jervis*, 3 Beav. 450, 461.

(*c*) *Aubin v. Daly*, 4 Barn. & Ald. 59.

(*d*) *Turner v. Turner*, 2 Amb.

776, 782; *Earl of Stafford v. Buckley*, ubi sup.

(*e*) See Principles of the Law of Real Property, 31, 34.

(*f*) *Ibid.* 275.

(*g*) *Taylor v. Martindale*, 12 Sim. 158.

The funds are
redeemable
annuities.

mined; although some mention of such annuities is certainly to be found in the old books (*h*). Soon after the Revolution, however, a portion of the public debt was funded, or transferred into perpetual annuities, payable, by way of interest, on the capital advanced, which capital was to be repaid by the government in the manner agreed on. And from that time to the present, the funded debt of the country has, by several acts of parliament, been greatly increased. Stock in the funds, therefore, is merely a right to receive certain annuities, by half-yearly dividends, as they become due (*i*), subject to the right of government to redeem such annuities on payment of a stipulated sum, which sum is the nominal value of the stock. Thus, 100*l.* 3*l.* per cent. Consolidated Bank Annuities is a right to receive 3*l.* per annum for ever, subject to the right of government to redeem this annuity on payment of 100*l.* sterling. The actual value of 100*l.* 3*l.* per cent. Consolidated Bank Annuities (or *Consols* as they are shortly termed) of course depends on the state of the stock market, being generally lower, though it has been higher, than the nominal price, which is called *par*.

Consols the
investment of
the Court of
Chancery.

The public funds are composed of several separate stocks, of which, however, by far the largest and most important are the consols. In this fund the Court of Chancery invests all the money committed to its care belonging to the suitors in that court; and, as it is a rule of equity, that whatever the court would certainly order to be done, may be done without applying to the court, every trustee and executor is justified in investing in consols any money which he may hold in trust, without any express direction for that purpose (*k*). But

(*h*) Co. Litt. 144 b; Fitz. N. B. 152 a.

(*i*) *Wildman v. Wildman*, 7 Ves. 174, 177; *Rawlings v. Jennings*, 13 Ves. 38, 45.

(*k*) *Howe v. Lord Dartmouth*,

7 Ves. 150; *Holland v. Hughes*, 16 Ves. 114; *Tebbs v. Carpenter*,

should he invest trust money upon any other security, without express authority so to do, he will be answerable to his cestui que trust for the amount of the money so invested, should the security fail; and it seems also, that the cestui que trust has an option either to claim the money, or to have so much stock as the money improperly invested would have purchased at the time when the improper investment was made (l).

The legal nature and incidents of stock in the public funds have been fixed by the various acts of parliament by which these funds have been created. These statutes are far too numerous to be here mentioned; but their provisions are generally similar. By one of the earliest of these statutes (m), it is provided, that all persons who shall be entitled to any of the annuities thereby created, and all persons lawfully claiming under them, shall be possessed thereof *as of a personal estate, and the same shall not be descendible to the heir*. And the same rule holds with respect to all the public funds which now exist. Stock is personal estate.

The transfer of stock in the public funds is effected only by the signature of the books at the Bank of England in the manner prescribed by act of parliament; and this transfer may be effected either in person or by attorney duly appointed for the purpose by writing, under hand and seal, attested by two or more credible witnesses (n). The legal title to stock belongs to the person in whose name it is standing in the bank books; and the bank refuses to recognize trusts, or to keep Transfer of stock.

1 Mad. 306; *Norbury v. Norbury*, 4 Mad. 191.

Hunter, 6 Mad. 295; *Shepherd v. Moulds*, 4 Hare, 500, 504.

(l) *Forrest v. Elwes*, 4 Ves. 497; *Pride v. Fooks*, 2 Beav. 430; *Watts v. Girdlestone*, 6 Beav. 188. But see *Marsh v.*

(m) Stat. 1 Geo. I. st. 2, c. 19, s. 9.

(n) Stat. 1 Geo. I. st. 2, c. 19, s. 11, and subsequent acts.

more than one account for the same person; neither will it allow of the transfer of any stock into the names of more than four persons. When stock is standing in the name of a trustee, the beneficial owner may transfer his equitable interest in any manner he pleases. As the claim of the beneficial owner is equitable only, there will be no occasion to give to the transferee a power of attorney to sue in the name of the transferor (*o*); and the transferee, on giving notice of the transfer to the trustee, will be entitled to a legal transfer of the stock into his own name in the books at the Bank.

Sir John Barnard's Act.

As the constant fluctuations of the value of the funds were long since found to present a great temptation to gambling on the chance of their rise or fall, an act was passed in the reign of George II. (*p*) for the purpose of suppressing such transactions. This act was introduced into parliament by Sir John Barnard, whose name it bears; and it is intituled "An Act to prevent the infamous Practice of Stockjobbing." It contains several provisions directed against the practice of fictitious sales of stock for a future time, where the seller has not the stock he sells neither intends to procure it, and the buyer has no intention to purchase the amount he contracts for; but the only object of the parties is that, should the stock rise, the vendor should pay the buyer the difference occasioned by the increase in price, and, should it fall, the buyer should pay the vendor the difference occasioned by the decrease (*q*). But when

(*o*) See *ante*, p. 6.

(*p*) Stat. 7 Geo. II. c. 8.

(*q*) See *Child v. Morley*, 8 T. Rep. 610; *Heckscher v. Gregory*, 4 East, 607, 614. The buyer who is interested in the rise of the funds is called, in the language of the Stock Exchange, a

bull, the seller is a *bear*, but either party, if unable to pay his differences, becomes a *lame duck*. A stock^{holder}~~jobber~~, properly so called, is a person who supplies the public, through the medium of the brokers, with money or stock to the exact amount they may re-

an actual sale is in the contemplation of the parties, it is no objection that the vendor is not at the time of the contract actually possessed of the stock he agrees to sell (*r*). It seems that stock is not *goods, wares, or merchandize* within the 17th section of the Statute of Frauds (*s*), so that it does not require a written memorandum for a contract for its sale, if the value exceeds ten pounds and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part payment (*t*).

Contract for sale of stock not within the Statute of Frauds.

By a recent act of parliament (*u*) the Court of Chancery has been empowered to appoint any person to transfer stock, and to receive and pay over the dividends, in the place of any trustee or executor who may be out of the jurisdiction of or not amenable to the process of the court, or who may neglect or refuse to transfer such stock or receive and pay over the dividends to the persons entitled thereto, or when it shall be uncertain whether such trustee or executor shall be living or dead. And by the same act of parliament (*x*) the *committee* of any lunatic, idiot, or person of unsound mind, or incapable of managing his affairs, is empowered, by the direction of the Lord Chancellor, to transfer stock and to receive and pay over dividends in lieu of such lunatic, idiot or other person; but no provision has been made for the transfer of stock by infant trustees (*y*). By

Transfers of stock under the authority of the Court of Chancery.

Lunatics.

Infants.

quire, making a profit only of 1-8th per cent. on each transaction; a course of business altogether different from the "infamous" practices usually called stockjobbing by the public.

(*r*) *M'Callan v. Mortimer*, 9 Mee. & Wels. 636.

(*s*) Stat. 29 Car. II. c. 3. See *ante*, p. 36.

(*t*) See *Nunes v. Scipio*, 1

Com. 356; *Pickering v. Appleby*, 1 Com. 354; 2 P. Wms. 308; *Pawle v. Gumm*, 4 Bing. N. C. 445; *Humble v. Mitchell*, 11 A. & E. 205; *Knight v. Barber*, 16 M. & W. 66.

(*u*) Stat. 11 Geo. IV. & 1 Will. IV. c. 60, s. 10.

(*x*) Sects. 4, 5.

(*y*) *Watts v. Scrivens*, 1 Beav. 223.

Committees.

another act of parliament, the Court of Chancery is empowered to order the dividends of stock belonging to infants to be applied for their maintenance (*z*). By the same act the Lord Chancellor is also empowered to appoint a person to transfer stock and receive and pay over dividends, in the event of the committee having died intestate, or having himself become lunatic, or being out of the jurisdiction of or not amenable to the process of the Court of Chancery, or if it be uncertain whether such committee be living or dead, or if he should neglect or refuse to transfer such stock and to receive and pay over the dividends thereof (*a*). And the Lord Chancellor is also empowered to appoint a person to transfer stock standing in the name of or vested in any lunatic residing out of England; and also to receive and pay over the dividends thereof to the curator of such lunatic or otherwise as the Lord Chancellor shall think fit (*b*). By another recent act it is provided that when stock shall be standing in the name of any infant or person of unsound mind jointly with any person not under any legal disability, such person may alone give a power of attorney to receive the dividends (*c*).

Distringas.

When any person has an interest in stock standing in the name of another, he is enabled to restrain the transfer of such stock, or, as it is said, to *put a stop upon it*, by means of a writ of *distringas*, to be served upon the Bank of England. This writ appears to be in strictness a proceeding in a suit supposed to have been commenced by the party obtaining it against the Bank and the legal owner of the stock; but in practice a suit is not commenced, unless the right to stop the stock be disputed (*d*). This writ formerly issued only out of the

(*z*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 32.

(*a*) Sect. 33.

(*b*) Sect. 34.

(*c*) Stat. 8 & 9 Vict. c. 97, s. 3.

(*d*) See Wilkinson on the Funds, 235—252.

equity side of the Court of Exchequer, but when the equitable jurisdiction of that court was transferred to the Court of Chancery, it was provided that a writ of *distringas*, in a prescribed form, should issue out of the latter court, the force and effect of which, and the practice relating to the same, should be such as was previously in force in the Court of Exchequer (e). The writ commands the sheriff to *distrain* the bank by their lands and chattels, so that they appear in court to answer a bill of complaint lately exhibited against them and other defendants by the person obtaining the writ. The object of the writ is stated in a notice, which is served along with it, to be for the purpose of restraining any transfer of the stock in question until the order of the court be obtained. An appearance is accordingly entered by the Bank, and the transfer of the stock is thus restrained. ^{for the purpose of restraining the transfer of the stock} When the *distringas* is required to be removed, an order of the court may be readily obtained for the dismissal of the supposed suit. It is surprising that a course by which a cestui que trust of stock may be so effectually protected from any fraudulent transfer by his trustee, should not be more frequently adopted.

Stock being a kind of *chose in action*, could not formerly have been sold under a *fieri facias* issued in execution of a judgment against the owner (f). And, in fact, in the acts by which stocks were created, it was declared that they should not be taken in execution (g). But by the act for extending the remedies of creditors against the property of debtors (h), it is provided that any judge of one of the superior courts of common law (i), on the application of any judgment creditor, may order that any government stock of the debtor

Stock may be charged with judgment debts.

(e) Stat. 5 Vict. c. 5, s. 5.

15 Ves. 577.

(f) *Dundas v. Dutens*, 1 Ves. jun. 198.

(h) Stat. 1 & 2 Vict. c. 110, s. 14.

(i) *Miles v. Presland*, 4 Myl.

(g) *Bank of England v. Lunn*, & Cr. 431.

standing in his own name, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the debtor; but no proceedings are to be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order. And by a subsequent act of parliament (*k*), this provision is declared to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in such stock as in the dividends or annual produce thereof, and also to stock in which the debtor may be interested, standing in the name of the accountant general of the Court of Chancery. And in order to prevent any judgment debtor from disposing of the stock authorized to be charged, an order may be procured by the creditor in the first instance *ex parte*, restraining the Bank of England from permitting a transfer of the stock, until the order shall either be made absolute (that is confirmed and continued) or discharged; and no disposition of the judgment debtor in the mean time is to be valid or effectual as against the creditor. And the order will be made absolute if the debtor do not, within a time mentioned in the order, show cause to the contrary (*l*). When the debtor is entitled to the dividends of stock standing in the names of trustees, the order obtained by the creditor charging such dividends will be binding on the trustees; but the Bank must still pay the dividends to the trustees as legal owners (*m*).

Transmission of
stock by will.

The history of the law respecting the transmission of

(*k*) Stat. 3 & 4 Vict. c. 82,
s. 1. See *Hulkes v. Day*, 10
Sim. 41.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 15.

(*m*) *Churchill v. Bank of Eng-
land*, 11 Mee. & Wels. 323;
Bristead v. Wilkins, 3 Hare, 235.

stock by will affords a curious instance of the enactments of the legislature having been virtually overruled by the decisions of the Court of Chancery. The acts by which the funds were created, provided that any person possessed of stock might devise the same by will in writing *attested by two or more credible witnesses*; but that such devisee should receive no payment till so much of the will as related to the stock had been entered in the office at the Bank; and in default of such devise the stock should go to the executors or administrators (*n*). The Court of Chancery however held, that as stock had been declared by parliament to be personal estate, it must, like all other personal estate, devolve, in the first instance, on the executor for payment of debts, even though it should have been specifically bequeathed (*o*); and that the executor, having it in his hands by virtue of his office of executor, was bound after payment of debts to dispose of it according to the will of his testator, even although such will were unattested (*p*). For it will be remembered that, previously to the act for the amendment of the laws with respect to wills (*q*), a will of personal estate required no attestation (*r*). In effect, therefore, a person was enabled to bequeath his stock by a will unattested. All wills, however, are now required to be attested by two witnesses. And by a recent act of parliament the provisions of the old acts, which had virtually been disregarded, have been formally repealed; and it is declared that the stock of a deceased person may be transferred by his executors or administrators, notwithstanding any specific bequest or disposition thereof con-

(*n*) Stat. 1 Geo. I. stat. 2, c. 19, s. 12, and subsequent acts.

(*o*) *Bank of England v. Moffatt*, 3 Bro. C. C. 260; *Bank of England v. Parsons*, 5 Ves. 665; *Bank of England v. Lunn*, 15 Ves. 569.

(*p*) *Ripley v. Waterworth*, 7 Ves. 440; *Franklin v. Bank of England*, 575, 589.

(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26.

(*r*) Principles of the Law of Real Property, 305.

tained in the will; but the Bank are not to be required to allow of such transfer, or of the receipt of any dividend on the stock, until the probate of the will or the letters of administration shall have been first left at the Bank for registration. And the Bank may require all the executors who shall have proved the will to concur in the transfer(s). And the registry of specific bequests of stock is no longer required, but merely the registry of the names of the deceased party, and of his executors and administrators (t).

Shares.

The next kind of incorporeal personal property which we shall mention are shares in joint stock companies. Joint stock companies were formerly of two kinds, those which were incorporate, or made into *corporations*, and those which were not so.

Corporations
sole and aggregate.

Corporations are legal personages, always known by the same name, and preserving their identity through a perpetual succession of natural persons. They are either corporations *sole*, composed only of one person, such as a bishop, a parson, or the chamberlain of London; or corporations *aggregate*, composed of many persons acting on all solemn occasions by the medium of their *common seal* (u); and it is of such corporations that we are now about to speak. Such corporations may be created either by charter conferred by the queen's letters-patent, or by act of parliament. And till recently, all joint stock companies which had not obtained this expensive sanction were in fact private partnerships on an extended scale. Recently, however, as we shall hereafter see, provision has been made for the incorporation of all public joint stock companies (x); but such companies as are incorporated by letters-patent or special

(s) Stat. 8 & 9 Vict. c. 97, s. 1. rations; 1 Black. Com. ch. 18.

(t) Sect. 2.

(x) Stat. 7 & 8 Vict. c. 110; 7

(u) See Bac. Abr. tit. Corpo- & 8 Vict. c. 113.

act of parliament still enjoy peculiar privileges. These companies therefore first require notice.

The nature and incidents of shares in the joint stock of companies incorporated by letters-patent or act of parliament, have generally been determined by their respective charters or acts of incorporation. And in the great majority of cases, and in all the modern charters and acts of incorporation, the shares are declared to be personal estate, and transmissible as such. In a few of the older companies, of which the New River Company is an instance (*y*), the shares are real estate in the nature of incorporeal hereditaments. For the future, however, all the provisions contained in special acts for the incorporation of joint stock companies will, as far as possible, be the same. For an act of parliament has recently been passed “for consolidating in one act certain provisions usually inserted in acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature (*z*).” Other acts have also been passed for consolidating certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature (*a*); in acts authorizing the making of railways (*b*); in acts for constructing or regulating markets and fairs (*c*); in acts authorizing the making of gasworks for supplying towns with gas (*d*), or of waterworks for supplying towns with water (*e*); in acts for the making and improving of harbours, docks and piers (*f*); in acts for paving, draining, cleansing, lighting, and improving towns (*g*); and in acts authorizing the making of cemeteries (*h*). In

Companies incorporated by charter or act.

The Clauses Consolidation Acts.

(*y*) *Drybutter v. Bartholomew*, 2 P. Wms. 127.

(*z*) Stat. 8 & 9 Vict. c. 16.

(*a*) Stat. 8 & 9 Vict. c. 18.

(*b*) Stat. 8 & 9 Vict. c. 20.

(*c*) Stat. 10 & 11 Vict. c. 14.

(*d*) Stat. 10 & 11 Vict. c. 15.

(*e*) Stat. 10 & 11 Vict. c. 17.

(*f*) Stat. 10 & 11 Vict. c. 27.

(*g*) Stat. 10 & 11 Vict. c. 34.

(*h*) Stat. 10 & 11 Vict. c. 65.

each of these acts, enactments are made with respect to various matters usually contained in acts of incorporation for the above purposes; and it is provided that the clauses and provisions of these general acts, save so far as they shall be expressly varied or excepted by any special act, shall apply to every undertaking which shall thereafter be authorized by act of parliament for any of the purposes above referred to. A uniformity is thus given to the constitution of such companies, and the length of the acts of parliament required to establish them has been greatly diminished. A short title, for the convenience of reference, is given to each act. The act first mentioned is called "The Companies Clauses Consolidation Act, 1845 (*i*)," and all the others have similar titles.

Companies
Clauses Consol-
idation Act,
1845.

The Companies Clauses Consolidation Act contains provisions with respect to the distribution of the capital of the company into shares, which are to be personal estate, and transmissible as such (*k*); with respect to the transfer of shares, which must be by deed duly stamped, in which the consideration shall be truly stated (*l*), and which cannot take place until the transferor shall have paid all calls for the time being due on every share held by him (*m*); with respect to the transmission of shares by will, intestacy, marriage of a female, &c. (*n*); with respect to the payment of calls (*o*), and the forfeiture of shares for nonpayment of calls (*p*); with respect to the remedies of creditors of the company against the shareholders, which are confined to the extent of their shares in the capital of the company not then paid up, and may be exercised only in case there cannot be found sufficient property or effects of

(*i*) Stat. 8 & 9 Vict. c. 16, s. 4.

(*k*) Sect. 7.

(*l*) Sect. 14.

(*m*) Sect. 6.

(*n*) Sects. 18, 19.

(*o*) Sects. 21—28.

(*p*) Sects. 29—35.

the company whereon to levy execution (*q*); with respect to the borrowing of money by the company (*r*), the conversion of the borrowed money into capital (*s*), the consolidation of the shares into stock (*t*), general meetings (*u*), the appointment and rotation of directors (*x*), the powers (*y*), proceedings and liabilities of the directors (*z*), the appointment and duties of auditors (*a*), the accountability of the officers of the company (*b*), the keeping of accounts (*c*), the making of dividends (*d*), and of bye laws (*e*), the settlement of disputes by arbitration (*f*), the giving of notices (*g*), the recovery of damages and penalties (*h*), and appeals with respect to such damages or penalties to the quarter sessions (*i*); and lastly, with respect to affording access to the special act by all parties interested (*k*). The provisions of the other acts are not of a nature to require enumeration.

Joint stock companies which had not obtained letters-patent or special acts of incorporation were formerly subjected to very great inconvenience whenever they had occasion to take legal proceedings against any person who happened to be a shareholder. And every shareholder in such companies was subject to the like inconvenience whenever he had occasion to proceed against the company. For such a company, however extensive, was in law merely a partnership; and a partner who owes money to the partnership, of which he is a member, evidently owes a portion of it to himself, according to his interest in the joint stock; and in

Inconvenience of unincorporated joint stock companies.

(*q*) Stat. 8 & 9 Vict. c. 16, s. 36.

(*r*) Sect. 38—55.

(*s*) Sects. 56—60.

(*t*) Sects. 61—64.

(*u*) Sects. 66—80.

(*x*) Sects. 81—89.

(*y*) Sects. 90, 91.

(*z*) Sects. 92—100.

(*a*) Sects. 101—108.

(*b*) Sects. 109—114.

(*c*) Sects. 115—119.

(*d*) Sects. 120—123.

(*e*) Sects. 124—127.

(*f*) Sects. 128—134.

(*g*) Sects. 135—139.

(*h*) Sects. 142—158.

(*i*) Sects. 159, 160.

(*k*) Sects. 161, 162.

like manner, a partner who is a creditor, claims part of his demand against himself. In each case, therefore, an account must be settled before the exact debt or credit of the partner can be ascertained (*l*). In order to obviate the difficulties which thus arose, many joint stock companies obtained special acts of parliament, enabling them to sue and be sued in the name of some officer. And an act of parliament (*m*) was passed empowering the crown to grant, by letters-patent, charters to companies for any trading or other purposes whatsoever, which, without incorporating such companies, would empower them to sue and be sued in the name of some officer appointed and registered for the purpose. Banking companies, whose shareholders are generally their customers, were peculiarly subject to the inconvenience above referred to. Accordingly, by modern statutes, all such banking companies as consisted of more than six members were allowed to appoint some public officer for the purpose of suing and being sued in the name of the company (*n*). Recently, however, two acts of parliament have been passed, the one incorporating public joint stock companies, the other for providing for the incorporation of joint stock banks. Each of these acts requires some notice. ↙

Banking Companies.

Joint Stock Companies Registration Act.

The first act is intituled "An Act for the Registration, Incorporation and Regulation of Joint Stock Companies" (*o*). This act applies to every joint stock company established for any commercial purpose, or for any purpose of profit, or for the purpose of insurance, (except

(*l*) See *Richardson v. Bank of England*, 4 My. & Cr. 165.

(*m*) Stat. 7 Will. IV. & 1 Vict. c. 73, repealing a former statute or a similar purpose, 4 & 5 Will. IV. c. 94.

(*n*) Stat. 7 Geo. IV. c. 46, s.

9, *et seq.*; 1 & 2 Vict. c. 96; extended, 3 & 4 Vict. c. 111; made perpetual, 5 & 6 Vict. c. 85.

(*o*) Stat. 7 & 8 Vict. c. 110, amended by stat. 10 & 11 Vict. c. 78.

banking companies, schools, and scientific and literary institutions, and friendly, loan, and benefit building societies duly certified and enrolled under the statutes in force respecting such societies (*p*)); and the term "joint stock company" comprehends every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners; and also every insurance company, whether of lives, ships, or against fire or storm; and every company for granting or purchasing annuities on lives; and every friendly society insuring to an amount exceeding 200*l.* upon one life or for any one person; and also every partnership which at its formation, or by subsequent admission (except any admission subsequent on devolution or other act of law), shall consist of more than twenty-five members. But the act does not apply to companies incorporated by statute or charter, nor to companies authorized to sue and be sued in the name of some officer or person (*q*). This act provides for the establishment of a Registry Office, in which the name and business of every projected company, together with the names, occupations, and places of business and residence of the promoters of the company must be registered before they can proceed to make public, whether by way of prospectus, handbill, or advertisement, any intention or proposal to form the company (*r*). Further particulars are also to be registered as they shall be decided on from time to time (*s*). This registration, however, only enables the company to act provisionally, and it is therefore termed *provisional registration*. And before the company can act otherwise than provisionally, it must obtain a certificate of *complete registration*. This certificate can only be obtained on production of a deed

Registry Office.

Provisional registration.

Complete registration.

(*p*) See *post*, pp. 168, 169.

& 11 Vict. c. 78, s. 7.

(*q*) Sect. 2.(*s*) Stat. 7 & 8 Vict. c. 110, s.(*r*) Sect. 4. See also stat. 10 & 11 Vict. c. 78, ss. 4, 5, 6.

of settlement of the company, according to the form set forth in the act, signed by at least one-fourth in number of the persons who at the date of the deed have become subscribers, and who shall hold at least one-fourth of the maximum number of shares in the capital of the company (*t*). This deed must be certified by two directors of the company in a given form; and along with it must be produced a complete abstract or index of the deed, together with a copy of it for registration. Provision is also made for the registration, half-yearly or oftener, of all transfers of shares, and of changes in the names of the shareholders (*u*), and for an annual return of the name and business of every company (*x*). On complete registration being certified, the company becomes *incorporated* as from the date of the certificate, by the name of the company as set forth in the deed of settlement, with power to have a common seal, but on which must be inscribed the name of the company, and with other powers necessary to the conduct of their affairs (*y*), including a power to hold lands on obtaining a license for that purpose from the Board of Trade (*z*). Provision is also made for the registry of joint stock companies then existing, and for the alteration of their deeds of settlement in order to comply with the provisions of the act (*a*).

Incorporation.

Existing companies.

Transfer of shares.

The transfer of shares in every registered company is effected by deed in a given form, to be duly stamped, and in which the full amount of the pecuniary consideration for the sale must be truly expressed (*b*). But no sale or mortgage of any share is valid until the company has obtained a certificate of complete regis-

(*t*) Stat. 7 & 8 Vict. c. 110,
s. 7.

(*u*) Sects. 11—13.

(*x*) Sect. 14.

(*y*) Sect. 25.

(*z*) Stat. 10 & 11 Vict. c. 78,
ss. 1, 2, 3.

(*a*) Sects. 58, 59.

(*b*) Sect. 54.

tration, and the subscriber has been duly registered as a shareholder in the Registry Office(*c*); and no transfer can be made if the transferrer shall not then have paid up the full amount due to the company on every share held by him, unless there be a provision to the contrary in the deed of settlement(*d*). Shareholders in these companies are liable to the creditors of the company, if such creditors have used due diligence to obtain satisfaction by execution against the property of the company; but after the expiration of three years next after any person shall have ceased to be a shareholder, his liability ceases(*e*). Liability of shareholders.

The act which provides for the incorporation of banking companies is intituled "An Act to regulate Joint Stock Banks in England(*f*)."
The incorporation effected under the provisions of this act is by letters-patent, obtained, on petition, from the crown. The petition is referred to the Board of Trade, on whose report a charter is granted to the company(*g*) for a term not exceeding twenty years(*h*). A deed of settlement, according to a form approved by the Board of Trade, and containing certain specified provisions, is required to be executed by the holders of at least one-half of the shares, on which not less than ten per cent. shall have been then paid up, and is to be annexed to the petition; and the provisions of this deed are to be set forth in the letters-patent(*i*). The company, moreover, are not to commence business until all the shares shall have been subscribed for, and the deed executed by the holders of all the shares, and until not less than one-half of each Banking companies.

(*c*) Sect. 26. This does not apply to companies for executing works which cannot be carried into effect without the authority of parliament. *Young v. Smith*, 15 Mee. & Wels 121.

(*d*) Sect. 51.

(*e*) Sects. 66—68.

(*f*) Stat. 7 & 8 Vict. c. 113.

(*g*) Sect. 3.

(*h*) Sect. 6.

(*i*) Sect. 4.

Registry at the Stamp Office. share shall have been paid up (*k*). Before the company begin to carry on their business, a memorial, in a prescribed form, must be delivered for registry at the Stamp Office, in which must be set forth the true title or firm of the company, and the names and places of abode of all the members, as the same appear on the company's books, and the name and place of abode of every director and manager, or other like officer of the company, and the name of every bank established or to be established by the company, and also the name of every town or place where the business of the company shall be carried on. This memorial is to be annually renewed (*l*). And all changes in the proprietary are also to be registered in the like manner from time to time as occasion shall require (*m*). Provision is also made for the incorporation of then existing banking companies by letters-patent, to be obtained by petition to the crown, upon compliance with the provisions of the act (*n*). But if such companies should not obtain letters-patent of incorporation, they will retain the same powers and privileges of suing and being sued in the name of a public officer as they before enjoyed (*o*).

Existing companies.

Transfer of shares.

The transfer of shares in incorporated banking companies is effected by deed duly stamped, in which the consideration must be truly stated (*p*); and no shareholder is entitled to transfer any share until he has paid all calls for the time being due on every share held by him (*q*). Every shareholder is fully liable to the creditors of the company, if execution against the property and effects of the company shall be ineffectual; but this liability ceases after the expiration of three years from the time when any person shall have ceased to be a

Liability of shareholders.

(*k*) Sect. 5.

(*l*) Sect. 16.

(*m*) Sect. 17.

(*n*) Sect. 15.

(*o*) Sect. 47. See *ante*, p. 162.

(*p*) Sect. 23.

(*q*) Sect. 24.

shareholder, provided that judgment shall not have been previously obtained for any debt to which he was originally liable (*r*).

The main object of these two statutes was evidently to give publicity to the names of the real promoters and shareholders of joint stock companies, so that the public might know with whom they were dealing, and that those who reaped the benefit of such undertakings might also bear their proper share of the risk. Another object was to recognize, as legal personages, bodies which before had a legal existence, but had no convenient means of acting or of being acted on. In the same spirit another act of parliament was passed in the same session, "for facilitating the winding-up the affairs of joint stock companies unable to meet their pecuniary engagements (*s*)."^{Objects of these acts.} By this act all incorporated or privileged companies for any commercial or trading purposes, including banking companies (*t*), and also all joint stock companies within the definition contained in the act for their incorporation (*u*), are made liable to bankruptcy in the same manner as private individuals; but the bankruptcy of the company is not to be construed to be the bankruptcy of any member of the company in his individual capacity (*x*). The Court of Bankruptcy is authorized to direct the creditors' assignees to apply to the Court of Chancery to compel a just contribution from all the members of the company towards the full payment of all its debts and liabilities, and of the costs of winding-up its affairs (*y*).^{Bankruptcy of joint stock companies.}

(*r*) Sects. 7—10. The sense of the printed copy of the 10th section is spoiled by the insertion of a comma after the word "obtained" in the latter part of that section.

(*s*) Stat. 7 & 8 Vict. c. 111.

(*t*) Stat. 7 & 8 Vict. c. 113. s. 18.

(*u*) Stat. 7 & 8 Vict. c. 110, s. 2; *ante*, p. 163.

(*x*) Stat. 7 & 8 Vict. c. 111, s. 2.

(*y*) Sect. 20. See *In re Forth Marine Insurance Company*, 9 Beav. 469.

Inquiry is also to be made of the cause of the failure of the company, and the opinion of the court on this point is to be certified in writing to the board of trade (z); after which the crown, on the recommendation of that board, may, by any instrument under the great or privy seal, revoke all the powers and privileges granted to the company by any charter or act of parliament (a). Prosecutions may also be instituted by the board, if they think fit, against any director or officer of the company or other person (b).

Sale of shares
not within the
Statute of
Frauds.

Shares in joint stock companies are not *goods, wares* or *merchandise* within the 17th section of the Statute of Frauds; so that they do not require a written memorandum for a contract for their sale, when the value exceeds 10*l.*, and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part-payment (c).

Friendly so-
cieties.

Several acts of parliament have been passed for the encouragement of friendly societies, for the mutual relief of their members and their families in case of sickness, old age, death or other contingencies (d). The rules of these societies are required to be certified by a barrister appointed for the purpose (e), who is styled "The Registrar of Friendly Societies (f)," and in whose custody a transcript of the rules of every friendly society is now required to be kept (g). And it is now

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| (z) Sect. 25. | (e) Stat. 4 & 5 Will. IV. c. 40, |
| (a) Sect. 26. | s. 4. |
| (b) Sect. 27. | (f) Stat. 9 & 10 Vict. c. 27, |
| (c) <i>Humble v. Mitchell</i> , 11 Ad. | s. 10. |
| & Ell. 205; <i>Knight v. Barber</i> , | (g) Stat. 9 & 10 Vict. c. 27, |
| 16 M. & W. 66; <i>Bowdby v. Bell</i> , | s. 12. A transcript of the rules |
| 3 C. B. 284. See <i>ante</i> , p. 36. | was formerly required to be in- |
| (d) Stat. 10 Geo. IV. c. 56, | rolled with the clerk of the peace. |
| amended 4 & 5 Will. IV. c. 40; | Stat. 4 & 5 Will. 4, c. 40, s. 4. |
| 3 & 4 Vict. c. 73; 9 & 10 Vict. | |
| c. 27 | |

provided that the registrar of friendly societies shall not certify the rules of any friendly society for the purpose of securing any benefit depending on the laws of sickness or mortality, unless such society shall adopt a table which shall have been certified to be a table which may be safely and fairly adopted for such purpose under the hand of the actuary to the commissioners for the reduction of the national debt, or of some person who shall have been for at least five years an actuary to some life insurance company in London, Edinburgh or Dublin (*h*). On the death or removal of any treasurer or trustee of one of these societies, the whole property of the society vests in the succeeding treasurer or trustee for the same estate and interest as the former treasurer or trustee had therein, and subject to the same trusts, without any assignment or conveyance whatever, except the transfer of stocks and securities in the public funds (*i*). And on the death, bankruptcy or insolvency of any officer of any such society, or on any execution issuing against him, or on his making any assignment or conveyance for the benefit of his creditors, the money or effects in his hands belonging to the society are to be paid over and delivered to the society before any other of his debts are paid (*j*). Loan societies are regulated by another act of parliament, which is annually continued (*k*). Loan Societies.

An act of parliament has also been passed for the regulation of benefit building societies (*l*). Building societies. The funds of these societies are raised by monthly subscriptions of the members, which must not exceed 20s. per share, and by fines for non-payment. The shares must not exceed the value of 150*l.* each. When the amount of the shares has

(*h*) Stat. 9 & 10 Vict. c. 27,
s. 13.

(*i*) Stat. 10 Geo. IV. c. 56, s. 21.

(*j*) Stat. 1 & 5 Will. IV. c. 10,
s. 12.

(*k*) Stat. 3 & 4 Vict. c. 110,
last continued by stat. 10 & 11
Vict. c. 53.

(*l*) Stat. 6 & 7 Will. IV. c. 32.

been realized, the money is divided amongst the members, and the society is dissolved. Such members, however, as may wish to buy land or to build, may receive the amount of their shares in advance on payment of an additional subscription by way of interest, and also on payment of a bonus for the advance, which of course is deducted from the amount of the share advanced. This bonus is usually determined by competition amongst the members, the shares to be paid in advance being put up by auction by the society; and the subscriptions and fines to become due in respect of the advanced shares are then secured to the society by the purchasers, by mortgage of land or houses of sufficient value. These mortgages are exempt from any of the forfeitures or penalties of usury (*m*); and a receipt for the monies secured, indorsed by the trustees of the society upon any such mortgage, vests the estate comprised in the security in the person entitled to the equity of redemption, without any reconveyance (*n*).

Judgment debts. The provisions above referred to for charging the stock of any debtor with the payment of any judgment debt (*o*), extend to stock and shares in any public company in England, whether incorporated or not (*p*).

Patents. The prerogative of the crown in the grant of letters-patent is frequently exercised not only for the incorporation of joint stock companies, but also for conferring on private individuals certain exclusive rights and privileges. These rights, called *patents* from the letters-patent which confer them, will be considered in the next chapter.

(*m*) Sect. 2.

(*n*) Sect. 5.

(*o*) *Ante*, p. 155.

(*p*) Stat. 1 & 2 Vict. c. 110.
s. 14.

CHAPTER II.

OF PATENTS AND COPYRIGHT.

A PATENT is the name usually given to a grant from the crown, by letters-patent, of the exclusive privilege of making, using, exercising and vending some new invention (*a*). The granting of such letters-patent is an ancient prerogative of the crown. In the reign of Queen Elizabeth, this prerogative was stretched far beyond its due limits, and the monopolies thus created formed one of the grievances which King James, her successor, was at last obliged to remedy. Accordingly by a statute passed in the twenty-first year of his reign, and commonly called the Statute of Monopolies (*b*), it was declared and enacted that all such monopolies were altogether contrary to the laws of this realm, and so were and should be utterly void and of none effect, and in nowise put in ~~use~~^{use} or execution. In this statute, however, there are certain exceptions, and particularly one on which the modern law with respect to patents may be said to be founded. This exception is as follows: "Provided also and be it declared and enacted, that any declaration before-mentioned shall not extend to any letters-patent and grants of privilege for the term of *fourteen years* or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters-patents and grants shall not use, so also they be not contrary to the law nor mischievous to the state, by raising prices of commo-

A patent.

Statute of Monopolies.

Proviso.

(*a*) See a form of letters-patent in Appendix B.

(*b*) Stat. 21 Jac. I. c. 3.

dities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this act had never been made and of none other (c)."

It will be seen that the granting of letters-patent is not expressly warranted by this statute; but that it merely reserves to such letters-patent as fall within the terms of the exception, such force as they should have had if the act had never been made, and none other force. As, however, all grants of exclusive privilege by letters-patent, which do not fall within this exception, and some others of little importance, are now rendered void by the statute, the construction of this exception has become a matter of great practical importance. And first, the term must be *fourteen* years from the date of the letters-patent, or under; and the full term of fourteen years is usually granted. By a recent act of parliament (d), a prolongation of the term granted by the original letters-patent may be granted either to the original grantor or to his assignee (e), for a term not exceeding *seven* years after the expiration of the first term, in case the Judicial Committee of the Privy Council shall, upon proper application, report to her Majesty that such further extension of the term should be granted. And if such further period of seven years can be shown to be insufficient for the reimbursement and remuneration of the expense and labour incurred in perfecting the invention, then, by a subsequent statute (f), the crown may grant to the inventor, or his

Term of patent
fourteen years.

Extension of
term.

(c) Stat. 21 Jac. I. c. 3, s. 6. & Wels. 574; affirmed, 16 M. &

(d) Stat. 5 & 6 Will. IV. c. 83, W. 633.

s. 4, amended by 2 & 3 Vict. c. 67.

(f) Stat. 7 & 8 Vict. c. 69, ss. 2, 4.

(e) *Russell v. Ledsam*, 11 Mee.

assignee, an extension of the patent for any time not exceeding *fourteen* years.

Secondly, the patent must be for “new manufactures within this realm, which others at the time of making such letters-patents and grants shall not use.” The *use* here mentioned has been held to mean a use in public; if therefore the invention, for which the patent is sought to be obtained, has been previously used in public within the realm, the patent will be void (*g*). And the *realm* in this statute has been recently determined to mean the united kingdom of Great Britain and Ireland; so that if any invention has been publicly known or practised in England, a patent for Scotland will be void (*h*). By an act of parliament, to which we have before referred, it is however provided that letters-patent may be confirmed, or new ones granted, for any invention, or supposed invention, which shall have been found by the verdict of a jury, or discovered by the patentee or his assigns, to have been either wholly or in part invented or used before, if the Judicial Committee of the Privy Council, upon examining the matter, shall be satisfied that the patentee believed himself to be the first and original inventor, and that such invention, or part thereof, *had not been publicly and generally used* before the date of the first letters-patent (*i*).

New manufactures.

Thirdly, a patent must be granted “to the true and first inventor and inventors.” If, therefore, the original inventor should sell his secret to another person, such person cannot obtain letters-patent for the invention in his own name; but the original inventor must obtain the letters-patent, and then assign them to the other.

True and first inventor.

(*g*) *Lewis v. Marling*, 10 Barn. & Cres. 22; *Carpenter v. Smith*, 9 M. & W. 300.

(*h*) *Brown v. Annandale*, 8 Cl. & Fin. 214.

(*i*) Stat. 5 & 6 Will. IV. c. 83, s. 2.

If two persons should both make the same discovery, he who first publishes it by obtaining a patent for it, will be the true and first inventor within the meaning of the statute, although he may not actually have been the first to make the discovery (*k*). But a person cannot obtain a patent for an invention which has been communicated to him by another within the realm (*l*). If, however, a person should be in possession of an invention communicated to him from abroad, such person, if he be the first introducer of the invention into this country, is regarded by the law as the true and first inventor thereof within the meaning of the statute of James (*m*); and it is no objection that the patent is taken out in trust merely for the foreign inventor (*n*). The remaining restrictions imposed by the act require no comment.

Specification.

The granting of letters-patent is, as has been observed, a prerogative of the crown; and although a patent may now be always obtained for any new invention, yet the grant is still a matter of favour and not of right, and all grants of letters-patent for inventions are at the present day clogged with certain conditions. Of these conditions, the most important is that which requires the inventor particularly to describe and ascertain the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and to cause the same to be inrolled in the High Court of Chancery within a given period, generally from two to six calendar months from the date. This instrument is called the *specification*, and the object of the condition is to secure to the public the benefit of the knowledge of the invention after the

(*k*) *Boulton v. Bull*, 2 H. Black. 487.

(*l*) *Hill v. Thompson*, 8 Taunt. 395; S. C. 2 J. B. Moore, 452.

(*m*) *Edgeberry v. Stephens*, 2 Salk. 417.

(*n*) *Beard v. Egerton*, 3 C. B. 97, 129.

term granted by the patent shall have expired. The framing of the specification is accordingly a matter of great nicety; for the description contained in it must correspond with the title of the invention contained in the letters-patent (*o*), and must clearly describe the invention (*p*), neither covering more than the proper subject of the patent (*q*), nor omitting anything necessary to make the description intelligible (*r*). Provision however has been made by an act of parliament before referred to (*s*), for enabling the grantee or assignee of any letters-patent to enter a *disclaimer* of any part of either the title of the invention, or of the specification, stating the reason of such disclaimer, or to enter a memorandum of any alteration in the title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the patent. Under this provision, letters-patent originally void may in many cases be rendered valid from the time of the entry of the disclaimer or alteration (*t*). Disclaimer.

Another condition usually inserted in letters-patent renders them void, in case the letters-patent, or the liberty and privileges thereby granted, shall become vested in or in trust for more than the number of twelve persons, or their representatives, at any one time, as partners, dividing or entitled to divide the benefit or profit obtained by reason thereof; but executors or administrators are to be reckoned as the single person whom they represent, as to such interests as they may be entitled to in right of their testator or intestate. The Vesting in more than twelve persons.

(*o*) *Rex v. Wheeler*, 2 Barn. & Ald. 345, 350. See *Nickels v. Haslam*, 7 Man. & Gran. 378; *Beard v. Egerton*, 3 C. B. 97.

(*p*) *Bloxham v. Elsee*, 6 Barn. & Cres. 169.

(*q*) *Hill v. Thompson*, 3 Meriv. 629.

(*r*) *Rex v. Wheeler*, ubi supra; *Neilson v. Harford*, 8 Mee. & Wels. 805.

(*s*) Stat. 5 & 6 Will. IV. c. 83, s. 1. See also stat. 7 & 8 Vict. c. 69, ss. 5, 6.

(*t*) *Perry v. Skinner*, 2 M. & W. 471.

vesting of the patent in the assignees of a bankrupt patentee for the benefit of his creditors who may exceed twelve in number (*u*), or a voluntary assignment of the patent to trustees for creditors exceeding twelve in number (*x*), is not such a vesting in trust as will vitiate the patent under this clause.

License to use
patent.

In letters-patent a clause is usually contained forbidding all persons from using the invention without the license, consent or agreement of the inventor, his executors, administrators or assigns, in writing under his or their hands and seals, first had and obtained in that behalf. The granting of licenses to use a patent is one of the most profitable ways of turning it to account; and it has been decided that an exclusive license to use a patent may be granted to more than twelve persons as partners, notwithstanding the condition which renders the patent void on its becoming vested in or in trust for more than that number of persons (*y*); although it is not easy to see in what respect an exclusive license substantially differs from an assignment. When it is wished to work a patent by means of a joint stock company, a special act of parliament is usually procured to authorize the patentee to transfer his right to the company.

Scotch and Irish
patents.

Letters-patent obtained in England confer an exclusive privilege only within England, Wales and the town of Berwick upon Tweed; and also within the islands of Guernsey, Jersey, Alderney, Sark and Man, and her Majesty's colonies and plantations abroad, if so expressed in the patent. In order to obtain the like exclusive privilege for Scotland, it is necessary to obtain separate letters-patent under the seal appointed by the

(*u*) *Bloxam v. Elsee*, 6 Bar. & C. B. 496, 516.
Cress. 169.

(*y*) *Protheroe v. May*, 5 M. &

(*x*) *McAlpine v. Mangnall*, 3 W. 675.

treaty of union to be used instead of the great seal of Scotland; and in the same manner the like privilege for Ireland must be obtained by letters-patent under the great seal for Ireland. If the inventor declares that he intends to apply for a patent for Scotland, he has usually four months allowed him for the enrolment of his specification; and if he should declare his intention to apply for patents for both Scotland and Ireland, the time of enrolment is usually extended to six months.

Letters-patent and the privileges thereby granted are freely assignable from one person to another, and the assignee by such assignment is placed in the same position as his assignor previously stood. The assignee may consequently bring in his own name the same actions and suits both at law and in equity against those who have infringed upon the patent as the patentee himself might have done (z). The privileges granted by letters-patent are therefore plainly an instance of an incorporeal kind of personal property, different in its nature from a mere *chose in action*, which never has been assignable at law. A deed is said to be necessary for the valid legal assignment of letters-patent; but the author is not aware of any authority for this position; and the general rule appears to be, that the assignment of incorporeal personal property may be made without deed. Perhaps, however, the necessity of an assignment by deed may be implied from the clause in the letters-patent, which forbids the use of the invention "without the license, consent or agreement of the inventor, his executors, administrators or assigns, in writing under his or their hands and seals, first had and obtained in that behalf."

Assignment of letters-patent.

As to the necessity of a deed.

Closely connected with the subject of patents is that of copyright. Copyright may be defined to be the ex-

Copyright.

(z) Godson on Patents, 237.

clusive right of multiplying copies of an original work or composition (*a*). From the nature of this right it must almost necessarily have had its origin at a period subsequent to the invention of the art of printing. It is however the better opinion that such a right existed prior to the statute of Anne (*b*), by which the term of an author's copyright was first limited by the legislature (*c*). But this statute, together with others by which the copyright of authors was further secured (*d*), has been repealed by the act of the present reign to amend the law of copyright, on which the law of copyright now depends (*e*). By this act the copyright of every book (which term includes for the purposes of the act every pamphlet, sheet of letter-press, sheet of music, map, chart or plan) published after the passing of the act in the lifetime of the author shall endure for his natural life, and for the further term of seven years from his death, and shall be the property of such author and his assigns; but if the term of seven years shall expire before the end of forty-two years from the first publication of the book, the copyright shall in that case endure for such period of forty-two years; and the copyright in every book published after the death of its author shall endure for forty-two years from the first publication thereof (*f*). By the same act the existing copyright in books then published is extended for the full term provided by the act in the case of books thereafter published. But if the copyright belong wholly or partly to a publisher or other person, who has acquired it for any other consideration than that of natural love and affection, the copyright is not to be extended by the act, unless the author, if living, or his personal repre-

Present act.

Extension of
existing copy-
rights.

(*a*) 14 M. & W. 316.

(*b*) 8 Anne, c. 19.

(*c*) *Miller v. Taylor*, 4 Burr.

2303; *Donaldson v. Beckett*, 4

Burr. 2408; 2 Bro. P. C. 129.

(*d*) 41 Geo. III. c. 107; 54

Geo. III. c. 156.

(*e*) 5 & 6 Vict. c. 45.

(*f*) Sect. 3.

sentative if he be dead, and the proprietor of such copyright, shall, before the expiration of the subsisting term of copyright, consent and agree to accept the benefits of the act, and shall register a minute of such consent in the prescribed form; in which case the copyright shall endure for the full term provided by the act, and shall be the property of the person or persons expressed in the minute (*g*). And in order to provide against the suppression of books of importance to the public, the Judicial Committee of the Privy Council is authorized, on complaint made to them, that the proprietor of the copyright in any book, after the death of its author, has refused to allow its republication, to grant a license to the complainant to publish the book in such manner and subject to such conditions as they may think fit (*h*). And with regard to encyclopædias, reviews and other periodical works, it is provided, that the copyright in every article shall belong to the proprietor of the work for the same term as is given by the act to authors of books, whenever any such article shall have been or shall be composed on the terms that the copyright therein shall belong to such proprietor and be paid for by him (*i*); but after the term of twenty-eight years from the first publication of any such article, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by the act; and during such term of twenty-eight years the proprietor shall not publish any such article separately without previously obtaining the consent of the author or his assigns. But any author may reserve to himself the right to publish any such composition in a separate form, and he will then be entitled to the copyright in such composition when published separately, without prejudice to the right of the proprietor of the encyclopædia, review or other peri-

Encyclopædias,
reviews, &c.

(*g*) Sect. 4.

(*h*) Sect. 5.

(*i*) See *Bishop of Hereford v. Griffin*, V. C. E. 12 Jurist, 255,

Dramatic and
musical com-
positions.

odical in which it may have first appeared (*j*). By the same act the sole liberty of representing any dramatic piece at any place of dramatic entertainment, and of performing any musical composition in any public place (*k*), is secured to the author and his assigns for the same term as is provided for the duration of copyright in books (*l*). The property in dramatic works had previously been secured to their authors for a shorter period by an act of the reign of King William the Fourth (*m*).

Registry of pro-
priators of copy-
rights.

By the same act a book of registry is required to be kept at Stationers' Hall, open to public inspection on payment of a small fee, in which may be registered the proprietorship and assignment of copyrights (*n*). And no proprietor of copyright in any book which shall be first published after the passing of the act can maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused such book to be registered pursuant to the act; but the omission to register will not affect the copyright in the book, but only the right to sue or proceed in respect of the infringement thereof. And the remedies of the proprietors of the sole liberty of representing any dramatic piece under the above-mentioned act of Will. IV. are not to be prejudiced, although no entry shall be made in the register book (*o*). And every registered proprietor is empowered to assign his interest by making entry in the book of registry of such assignment, and of the name and place of abode of the assignee, in the form given in a schedule to the act; and such assignment so entered is declared

Assignment.

- | | |
|--|---|
| (<i>j</i>) Sect. 18. | (<i>m</i>) 3 & 4 Will. IV. c. 15. |
| (<i>k</i>) <i>Russell v. Smith</i> , 15 Sim. | (<i>n</i>) 5 & 6 Vict. c. 45, ss. 11, |
| 181. | 19, 20. |
| (<i>l</i>) Sect. 20. | (<i>o</i>) Sect. 24. |

to be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and to be of the same force and effect as if such assignment had been made by deed (*p*). But if the right of representing any dramatic piece or performing any musical composition is intended to pass to the assignee of the copyright, an entry must be expressly made of such intention (*q*).

The act also expressly provides, that all copyrights protected by the act shall be deemed personal property, and shall be transmissible by bequest ; or in case of intestacy, shall be subject to the same laws of distribution as other personal property (*r*).

Copyrights to be personal property.

In order to give more effectual protection to persons entitled to the copyright of books, it is also provided, that no person, not being the proprietor of the copyright, or some person authorized by him, may import into any part of the united kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the united kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions (*s*). And by a subsequent act (*t*), books, wherein the copyright is subsisting, first composed or written or printed in the united kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported into the British possessions abroad, provided the proprietor of such copyright, or his agent, shall have given notice in writing to the commissioners of customs that such copyright subsists, and in such notice shall have stated when the copyright will expire. But by a more recent

Importation of foreign reprints of books entitled to copyright.

(*p*) Sect. 13.

(*s*) Sect. 17.

(*q*) Sect. 22.

(*t*) Stat. 8 & 9 Vict. c. 93, s. 9.

(*r*) Sect. 25.

act(*u*) it is provided, that in case the proper legislative authorities in any British possession shall make any act or ordinance to make due provision for securing the rights of British authors in such possession, her Majesty, on the same being transmitted to the Secretary of State, may, if she think fit so to do, express her royal approval of such act or ordinance, and thereupon may issue an order in council declaring that, so long as the provisions of such act or ordinance continue in force within such colony, the prohibitions contained in the above-mentioned acts, or in any other acts, with respect to foreign reprints of books first composed, written, printed or published in the united kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such order in council.

Copyright in
prints, maps,
&c.

By acts of parliament of an older date, copyright has also been created in prints, engravings, maps, charts and plans for the term of twenty-eight years, to commence from the day of first publishing thereof; which day, together with the proprietor's name, is to be truly engraved on each plate, and printed on every print(*x*). Under these acts the assignee of the copyright may bring an action in his own name against any person who may pirate it(*y*). And by a recent statute(*z*) all the provisions contained in these acts are extended to the united kingdom of Great Britain and Ireland. And it is provided(*a*) that, if any person shall, during the existence of the copyright, engrave, etch or publish any

(*u*) Stat. 10 & 11 Vict. c. 95.

(*x*) 8 Geo. II. c. 13, amended
by 7 Geo. III. c. 38, and ren-
dered more effectual by 17 Geo.
III. c. 57.

(*y*) *Thompson v. Symonds*, 5
T. Rep. 41.

(*z*) Stat. 6 & 7 Will. IV. c. 59,
s. 1.

(*a*) Sect. 2.

engraving or print of any description whatever, either in whole or in part, already published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first obtained in writing signed by him, her or them respectively, with his, her or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor may, by a separate action upon the case, to be brought against the person so offending, in any court of law in Great Britain or Ireland, recover such damages as a jury shall assess, together with double costs of suit.

By other acts of parliament copyright has been granted to the makers of new and original sculptures, models, copies and casts for the term of fourteen years from their first putting forth or publishing the same (*b*), with a further term of fourteen years to the original maker, if he shall be then living (*c*); provided that in every case the proprietor cause his name, with the date, to be put on every such sculpture, model, copy or cast before the same shall be put forth or published (*d*). And it is also provided that no person who shall purchase the right or property of any such sculpture, model, copy or cast of the proprietor, expressed in a deed in writing signed by him with his own hand, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying, casting or vending the same (*e*). Copyright in sculptures, &c.

By an act of parliament recently passed to amend the law of international copyright (*f*), her Majesty is empowered by any order in council to grant the privilege International copyright.

(*b*) 38 Geo. III. c. 71, amended
by 54 Geo. III. c. 56.

(*c*) Sect. 4.

(*f*) Stat. 7 & 8 Vict. c. 12, ss.

(*c*) 54 Geo. III. c. 56, s. 6.

2, 3, 4.

(*d*) Sect. 1.

of copyright for such period as shall be defined in such order (not exceeding the term allowed in this country), to the authors, inventors and makers of books, prints, articles of sculpture, and other works of art, or any particular class of them, to be defined in such order, which shall, after a future time to be specified in such order, be first published in any foreign country, to be named in such order. And her Majesty is also empowered (*g*) by any order in council to direct that the authors of dramatic pieces and musical compositions, which shall, after a future time to be specified in such order, be first publicly represented or performed in any foreign country, to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period allowed in this country. Provision however is made for the entry of proper particulars of the subjects for which copyright shall be granted, in the register book of the Stationers' Company in London, within a time to be prescribed in each such order in council (*h*). And all copies of books wherein there shall be any subsisting copyright by virtue of this act, or of any order in council made in pursuance thereof, printed or reprinted in any foreign country except that in which such books were first published, are absolutely prohibited to be imported into any part of the British dominions, except with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing (*i*). But no such order in council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign power named in such order in council, for the benefit of parties interested in works first published in the dominions of her Majesty, similar

(*g*) Sect. 5.

(*i*) Sect. 10.

(*h*) Sects. 6, 7, 8, 9.

to those comprised in such order (*k*). And every such order in council is to be published in the London Gazette as soon as may be after the making thereof, and from the time of such publication shall have the same effect as if every part thereof were included in the act (*l*). But nothing contained in the act is to prevent the printing, publication or sale of any translation of any book, the author whereof and his assigns may be entitled to the benefit of the act (*m*). And no copyright is allowed to any book, dramatic piece, musical composition, print, article of sculpture, or other work of art, first published out of her Majesty's dominions, otherwise than under this act.

By recent statutes a copyright has been granted to designs for articles of manufacture for the term of three years, one year, or nine calendar months, according to the nature of the manufacture (*n*); and, in pursuance of these acts, a registrar of designs for articles of manufacture has been appointed, by whom all designs to be protected by the acts are required to be registered (*o*); and provision is also made for the transfer of the copyright in such designs by any writing purporting to be a transfer, and signed by the proprietor, and also for the registration of transfers in a prescribed form (*p*).

Designs for
articles of ma-
nufacture.

(*k*) Sect. 14.

Vict. c. 65.

(*l*) Sect. 15.

(*o*) 6 & 7 Vict. c. 65, ss. 7, 8,

(*m*) Sect. 18.

9.

(*n*) 5 & 6 Vict. c. 100, by

(*p*) 5 & 6 Vict. c. 100, s. 6;

which all the previous statutes
were consolidated, and 6 & 7

6 & 7 Vict. c. 65, s. 6.

PART IV.

OF PERSONAL ESTATE GENERALLY.



CHAPTER I.

OF SETTLEMENTS OF PERSONAL PROPERTY.

PERSONAL property is capable of being settled, but not in the same manner as land. Land being held by estates, is settled by means of life estates being given to some persons, with estates in remainder in tail and in fee simple to others. But personal property, as we have already observed (*a*), is essentially the subject of absolute ownership. The settlement of such property, by the creation of estates in it, cannot therefore be accomplished. And there is a striking difference in many cases between the effect of the same limitation, according as it may be applied to real or to personal property.

No estate for life.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property in the strict meaning of the phrase. Thus if any chattel, whether real or personal, be assigned to A. for his life, A. will at once become entitled in law to the whole. By the assignment, the property in the chattel passes to him, and the law knows nothing of a reversion in such chattel remaining in the assignor. And this is the case even though the chattel be a term of years of such a length (for instance 1000 years) that A. could not possibly live so long (*b*). The term is considered in law as an indivisible chattel, and consequently

(*a*) *Ante*, p. 7.

(*b*) 2 *Prest. Abst.* 5.

incapable of any such modification of ownership as is contained in a life estate.

An apparent exception to the above rule has long been established in the case of a bequest by will of a term of years to a person for his life: in this case the intention of the testator is carried into effect by the application of a doctrine similar to that of executory devises of real estates (c). The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by deed; but on his decease the term is held to shift away from him, and to vest, by way of *executory bequest*, in the person to be next entitled (d). Accordingly, if a term of years be bequeathed to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere *possibility*, as it is termed (e), until after the decease of A.; and this possibility, like the possibility of obtaining a real estate, was formerly inalienable at law unless by will (f), though capable of assignment in equity (g). But by the act to amend the law of real property (h), which repeals an act of the previous session passed for the same purpose (i), it is now provided that an executory and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, may be disposed of by deed. B. may therefore, during the life of A., assign his expectancy by deed; and such assignment will entitle the assignee to the whole term on A.'s decease. If, however, no such assignment should have been made, B. will become, on

Bequest of a term for life.

Executory bequests.

Possibility.

How alienable.

(c) See Principles of the Law of Real Property, 240.

(d) *Matthew Manning's case*, 8 Rep. 95; *Lampert's case*, 10 Rep. 47.

(e) See Principles of the Law

of Real Property, 214, 215.

(f) Shep. Touch. 239.

(g) Fearne, Cont. Rem. 548.

(h) Stat. 8 & 9 Vict. c. 106, s. 6.

(i) Stat. 7 & 8 Vict. c. 76, s. 5.

the decease of A., possessed of the whole term, which will then shift to B. by virtue of the executory bequest in his favour. The mere circumstance, indeed, of the term being bequeathed to A. for his life only, will operate to shift away the term on his decease (*k*), independently of the bequest to B.; so that, if there had been no bequest over to B., the interest of A. would continue only during his life, and would then remain part of the undisposed of property of the testator. It may, however, be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real (*l*).

Life interests in equity.

The strict and ancient doctrine of the indivisibility of a chattel, though still retained by the courts of law, has no place in the modern Court of Chancery, which, in administering equity, carries out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B., A. is merely entitled to a life interest, and B. has, during the life of A., a vested interest in remainder, of which he may dispose at his pleasure; and the Court of Chancery will compel the person to whom the courts of law may have awarded the legal interest, to make good the disposition. Accordingly, if the personal property so given should consist of moveable goods, equity will compel A., the owner for life, to furnish and sign an inventory of the goods, and an undertaking to take proper care of them (*m*). This doctrine, however, is comparatively of modern date; for formerly the Court of Chancery followed the rules of law in the construction of such gifts; and if a gift of moveable goods had been made to A. for his life, and after

Ancient distinction between a gift of goods and a gift of the use of goods.

(*k*) *Eyres v. Faulkland*, 1 Salk. 231; *Ker v. Lord Dungannon*, 1 Drn. & War. 509, 528.

(*l*) *Fearne*, Cont. Rem. 413.

See, however, 1 Jarm. Wills, 793; *Hoare v. Parker*, 2 T. Rep. 376.

(*m*) *Fearne*, Cont. Rem. 407;

Conduitt v. Soane, 1 Coll 285.

his decease to B., they would not have afforded to B. any assistance after A.'s decease(*n*). But if the gift had been of the *use or enjoyment* of the goods only to A. for his life, and after his decease to B., the court would then have assisted B., by declaring A.'s representatives after his decease to be trustees only for the benefit of B(*o*). But this distinction is now exploded; and in all cases, as we have said, modern equity will assist the donee in remainder, to whom any gift of personal estate may be made after the decease of another who is to have them only for his life(*p*). When therefore it is wished to make a settlement of any kind of personal property, the doctrine of the Court of Chancery is at once resorted to. The property is assigned to trustees, *in trust* for A. for his life, and after his decease *in trust* for B., &c. This assignment to the trustees vests in them the whole legal interest in the property; and, in a court of law, they are held to be absolutely entitled to it; for the Statute of Uses(*q*) has no application to any kind of personal estate. But in equity the trustees are compellable to pay the entire income to A. for his life, and after his decease to B., and so on, according to the trusts of the settlement; and if B. should alien his interest during the life of A., the trustees will be bound, on having notice of the disposition, to stand possessed of the property after A.'s decease, in trust for the alienee(*r*).

Settlement of personal property by means of trusts.

When shares in joint stock companies are settled in the manner above mentioned, it sometimes becomes a question whether any extraordinary profit which may be divided amongst the shareholders by way of bonus should be considered as capital or as interest. The

Bonus.

(*n*) Fearn, Cont. Rem. 402. 121.

(*o*) *Ibid.* 404.

(*p*) *Ibid.* 406.

(*q*) 27 Hen.VIII. c. 10; Principles of the Law of Real Property,

(*r*) A form of a marriage settlement of stock and other personal estate upon the usual trusts will be found in Appendix C.

equitable tenant for life is too frequently inclined to consider himself entitled to any bonus in the same manner as to ordinary dividends. The Court of Chancery, however, usually considers every bonus, whether consisting of additional joint stock or shares (*s*), or simply of money (*t*), as part of the capital, unless it appear to be nothing more than an increased dividend arising from the increased profits of the year (*u*). In the absence, therefore, of any special provision to the contrary, every bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life.

Apportionment
of income.

By a recent act of parliament (*v*), on the decease of a person entitled to a life interest in any property, whether real or personal, his executors or administrators are entitled to recover from the remainderman an apportioned part of the next payment of the income, according to the time which shall have elapsed since the last period of payment, up to and including the day of the decease of such person. And when any other limited interest determines, a similar right to an apportionment is also given (*x*). But where the property ceases with the interest, and does not go over to another, as in the case of a life annuity, the act appears inapplicable; and the right to an apportioned part should therefore, if desired, be expressly conferred. The act extends only to instruments executed, and wills coming into operation, after the passing of the act, which took place on the 16th June, 1834 (*y*); and its provisions do not apply to any case in which it is expressly stipulated that no apportionment

(*s*) *Brander v. Brander*, 4 Ves.
800; *Hooper v. Rossiter*, 13 Price,
774; *S. C. McClelland*, 527.

(*t*) *Paris v. Paris*, 10 Ves.
185; *Ward v. Combe*, 7 Sim.
634.

(*u*) *Barclay v. Wainewright*, 14

Ves. 66.

(*v*) Stat. 4 & 5 Will. IV. c. 22,
s. 2.

(*x*) See *Browne v. Amyot*, 3
Hare, 173, 183.

(*y*) *Michell v. Michell*, 4 Beav.

549.

shall take place, or to annual sums made payable in policies of assurance of any description (*z*). Previously to this act no apportionment was made of annuities, or of the dividends of stock settled in trust for one person for life, with remainder to another; but the remainderman was entitled to the whole of the annuity or dividend which fell due next after the decease of the person entitled for life (*a*). If, however, the annuity were given for the maintenance of an infant (*b*), or of a married woman living separate from her husband (*c*), the necessity of the case was considered a ground for presuming that an apportionment was intended. The interest of money lent was also always apportioned; for though the payment of such interest be made half-yearly, yet it becomes due *de die in diem*, so long as the principal remains unpaid (*d*). Previous law.

✓

Annuity given for maintenance.

Interest was always apportioned.

An estate tail, such as that created by a gift of lands to a man and the heirs of his body (*e*), has nothing analogous to it in personal property. An estate tail cannot be held in such property at law, neither does equity admit of any similar interest. A gift of personal property of any kind to A. and the heirs of his body will simply vest in him the property given (*f*). And in the construction of wills, where many informal expressions are allowed to vest an estate tail in lands, the general rule is, that expressions, which if applied to real estate would confer an estate tail, shall, when applied to personal property, simply give the absolute inte-

No estate tail in personal property.

(*z*) Stat. 4 & 5 Will. IV. c. 22, Black. 1016.
s. 3.

(*a*) *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, 3 Atk. 502. (*d*) *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Bancroft v. Lowe*, 13 Ves. 135.

(*b*) *Hay v. Palmer*, 2 P. Wms. 501; 1 Swanst. 349, note. (*e*) See Principles of the Law of Real Property, 26.

(*c*) *Howell v. Hanforth*, 2 W. 463. (*f*) *Fearne*, Cont. Rem. 461.

rest (*g*). The same effect will be produced by a gift of such property to a man and his heirs. The words "heirs," and "heirs of his body," are quite inapplicable to personal estate: the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest (*h*). Whilst, under the very same words, he would acquire a life interest only in real estate (*i*), he will become absolutely entitled to personal property. Thus a gift of lands to A. for life, and after his decease to B., gives to B. a mere life interest in remainder expectant on the decease of A. (*k*); unless indeed the gift be by will under the act for the amendment of the laws with respect to wills (*l*). But a gift of personal property to A. for life, and after his decease to B., gives to B. a vested equitable interest in the corpus or body of the fund, to which he becomes absolutely entitled, subject only to A.'s life interest; and the circumstance of B.'s dying in the lifetime of A. would be immaterial (*m*).

Word "heirs" inapplicable to personal estate.

A simple gift sufficient.

Example.

Use of the words executors, administrators, and assigns.

It is true that in deeds and other legal instruments, it is usual to transfer personal estate absolutely, by the use of the words "executors, administrators, and assigns." As real estate is conveyed to a man, his heirs and assigns (*n*), so personal property is assigned to him, his executors, administrators, and assigns. The executor or administrator is, as we shall see, the person who becomes legally entitled to a man's personal estate after

(*g*) 2 Jarm. Wills, 489.

(*l*) Stat. 7 Will. IV. & 1 Vict.

(*h*) *Byng v. Lord Stafford*, 5 Beav. 558.

c. 26, s. 28.

(*m*) *Benyon v. Maddison*, 2

(*i*) Principles of the Law of Real Property, 17, 110, 158.

Bro. C. C. 75.

(*k*) *Goodtitle d. Richards v.*

(*n*) Principles of the Law of Real Property, 111.

Edmonds, 7 T. Rep. 635.

his decease; in the same manner that a man's heir or assign becomes entitled to his real property. But the analogy extends no further. There is no manner of benefit in the use of these terms (*o*) as there is in the employment of the word "heirs." These terms, however, are constantly employed in conveyancing as words of limitation of an absolute interest; and a rule has sprung up with respect to their construction similar to the rule in Shelly's case, by which the word "heirs," when following a life estate given to the ancestor, is merely a word of limitation, giving to such ancestor an estate in fee (*p*). Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators, and assigns, A. will be simply entitled absolutely (*q*); in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple. But as the rule, so far as it applies to personal property, is not founded on the same strict principle as the rule in Shelly's case, a gift of such property to the executors or administrators (not adding assigns) of a person who has taken a previous life interest, may, under peculiar circumstances, be construed as giving him no further interest in such property (*r*); whilst, under the same circumstances, the word "heirs" in a gift of real estate would have given him the fee simple.

Rule in Shelly's case.

As no estates can subsist in personal property, it follows that the rules, on which contingent remainders in freehold lands depend for their existence, have never

Rules as to contingent remainders do not apply to contingent dispositions of personal property.

(*o*) *Elliot v. Davenport*, 1 P. Wms. 84.

Gayler, 5 Beav. 157; *Meryon v. Collett*, 8 Beav. 386; *Morris v. Howes*, 4 Hare, 599.

(*p*) See Principles of the Law of Real Property, 197.

(*r*) *Wallis v. Taylor*, 8 Sim.

(*q*) Co. Litt. 54 b; *Hames v. Hames*, 2 Keen, 646; *Graffley v. Humpage*, 1 Beav. 46; *Howell v.*

241; see 1 Beav. 52; *Daniel v. Dudley*, 1 Phi. 1; *Attorney-General v. Malkin*, 2 Phi. 64.

had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of executory devises and shifting uses. Thus a gift of lands to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years, creates a contingent remainder, which will fail in the event of no son of A. having attained the prescribed age at the time of his decease(s). The reason of this failure depends on the ancient rule, that there must always be some defined owner of the feudal possession; and, consequently, between the time of the death of A. and the time of his son's attaining the age of twenty-one years, some owner of the freehold ought to have been appointed, in whom the feudal possession might continue (t). Personal property, however, has evidently nothing to do with these feudal rules relating to possession. If, therefore, a gift be made of personal property to trustees, in trust for A. for his life, and after his decease, in trust for such son of A. as shall first attain the age of twenty-one years, or if a term of years be bequeathed to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one years in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest. His ownership will spring up, as it were, on the given event of his attaining the age. But as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities, which confines executory interests within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist (u), applies equally to personal as to real estate. And the further

Limit to future dispositions.

Restraint on accumulation.

(s) *Festing v. Allen*, 12 Mee. Real Property, 209, 227.
& Wels. 279; 5 Hare, 573. (u) *Ibid.* 242.

(t) Principles of the Law of

restriction on the accumulation of income imposed by the Thelluson Act (*x*), applies to trusts for the accumulation of the income of personal estate as well as real.

Equitable interests in personal property of a future kind may be created through the instrumentality of powers, in a similar manner, and to the same extent, as future estates in land (*y*). Thus stock in the funds may be vested in trustees upon such trusts as B. shall by any deed or by his will appoint, and in default of and until any such appointment, in trust for C., or upon any other trusts. Here C. will have a vested interest in the stock, subject to be divested or destroyed by B.'s exercising his power of appointment; and B., though not owner of the stock, has power to dispose of it by deed or will, and may if he please appoint to himself; in which case the trustees will be bound to transfer it to him. If the power should not be exercised by B., C. will then be entitled absolutely; and will not, as in the case of landed property, be subject to judgment debts incurred by B. (*z*), or to any other of his debts. But if B. should exercise his power by deed without valuable consideration, or by will, in favour of a third person, the stock so appointed would be considered in equity as part of the assets of B. the appointor, and would be subject to the demands of his creditors in preference to the claim of the appointee (*a*). In case of bankruptcy (*b*) or insolvency (*c*), it is also provided that all powers vested in the bankrupt or insolvent, which he might legally execute for his own benefit, (except the right of

If power is exercised without valuable consideration, the property appointed is subject to debts of appointor.

Bankruptcy and insolvency.

(*x*) Stat. 39 & 40 Geo. III. c. 98; Principles of the Law of Real Property, 243.

(*y*) See Principles of the Law of Real Property, 231, *et seq.*

(*z*) *Ibid.* 231.

(*a*) *Lassells v. Cornwallis*, 2

Vern. 465; *Bainton v. Ward*, 2 Atk. 172. The doctrine applies also to appointments of real estate.

(*b*) Stat. 6 Geo. IV. c. 16, s. 77.

(*c*) Stat. 1 & 2 Vict. c. 110, s.

49; 7 & 8 Vict. c. 96, s. 11.

nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of the creditors in the same manner as the bankrupt or insolvent might have executed the same.

Rules respecting powers over real estate apply to powers over personal property.

The rules respecting the necessity of a compliance with the terms and formalities of the power, whenever it is exercised otherwise than by will (*d*), and the relief afforded by the Court of Chancery on the defective exercise of a power (*e*), apply as well to personal as to real property. Powers over personal estate may also be exercised by women, without their husband's consent, and also in favour of their husbands, in the same manner as powers over land (*f*); and the provision of the recent Wills Act, which requires wills made in exercise of powers to be executed and attested like all other wills (*g*), applies equally to powers over personal estate. A general bequest of personal estate will also now include any personal estate which the testator may have only a *power* to appoint as he may think fit, in the same manner as a general devise of real estate will comprise real estate subject to any such power (*h*).

Appointment of children's portions.

A frequent instance of the employment of a power over personalty occurs in the case of children's portions, which are usually settled on all the children equally, subject to a power given to the parents to appoint the shares in a different manner. When such a power is exercised, the shares previously vested in the children are divested from them, and new shares are vested in them by the operation of the power. Formerly, if such a power were so worded as not to authorize an exclusive appointment to some or one of the children, it was held by the Court of Chancery, as a rule of equity, that each child ought to have a substantial share; and an ap-

(*d*) See Principles of the Law of Real Property, 232.

(*e*) *Ibid.* 232.

(*f*) *Ibid.* 235.

(*g*) *Ibid.* 234.

(*h*) *Ibid.* 236.

pointment to any child of a very small share was called an *illusory appointment*, and was held void (*i*). But this doctrine having given rise to difficulties and family disputes, from the uncertainty of the question what was too small or what a sufficient share, the meddlesome doctrine of equity on this point was a few years ago abolished by act of parliament (*k*); and now the appointment of any share, however small, cannot be set aside on the ground of its being illusory. The act extends, as did the doctrine, to real estate as well as personal; but landed property is, from its nature, seldom cut up into little portions.

Illusory appointments.

The doctrine of equity now abolished.

Although no appointment is now void for being illusory, yet where an exclusive appointment is not authorized, any appointment by which any object of the power would be entirely excluded, is still void. Thus, if 1000*l.* be given to A., B. and C. in such shares as their father shall appoint, and in default of appointment to them equally, an appointment of 900*l.* to A. would now be good, as 100*l.* would remain to be equally divided between the three (*l*), of which C. and D. would get each one-third (*m*). But a subsequent appointment of the remaining 100*l.* to B. would be void, as altogether excluding C., who is equally an object of the power (*n*). It is customary, however, in modern settlements to give to parents a power of appointment in favour of any one or more of the children exclusively of the others. And in order that those to whom appointments have been made should not obtain more than may have been intended for them, it is generally provided that no child taking any share of the fund under any appointment

Exclusive appointment, when void.

- (*i*) 1 Sugd. Pow. 568, *et seq.*; Sim. 2012
 1 Chance on Powers, 396, *et seq.* (*m*) *Wilson v. Piggett*, 2 Ves. jun. 351.
 (*k*) Stat. 11 Geo. IV. & 1 Will. IV. c. 46. (*n*) 2 Ves. jun. 355.
 (*l*) *Young v. Waterpark*, 13

Hotchpot.

shall be entitled to any share in the part unappointed without bringing his or her share into *hotchpot*, and accounting for the same accordingly. Under such a provision, A., in the instance above given, would not be entitled to any share in the 100*l.* unappointed, without also agreeing to a like division of his 900*l.* amongst himself and the others. The clause of hotchpot operates favourably to the representatives of those children who may happen to die before any appointment shall have been made to them. For when a power is given to appoint amongst children, no appointment can be made to the executors or administrators of those who may have died(o); so that such executors or administrators cannot possibly take more than the aliquot part given to the deceased child in default of any appointment; whilst they may be partially or totally excluded even from that by a partial or complete exercise of the power of appointment in favour of the surviving children, or even of a single survivor. When the appointment is partial only, the executors or administrators of a deceased child will, under the hotchpot clause, divide the fund unappointed with the other children to whom no appointment may have been made; whereas, without such a clause, the children to whom appointments may have been made, would be equally entitled to participate in the part unappointed.

Appointment
amongst a class.

When a power is given to appoint property amongst a particular class, no portion of the fund can be appointed in favour of any person who is not a member of that class; and any appointment to such a person will accordingly be void. Thus, if the power be to appoint the property to all or any of the *children* of the appointor in such manner as he may think fit, no interest in the property can be appointed to any *grandchild* of

Children.

(o) *Boyle v. The Bishop of Ricketts v. Loftus*, 4 You. & Peterborough, 1 Ves. jun. 299; Coll. 519.

the appointor; for a grandchild is not an object of the power (*p*). So if the power be to appoint amongst nephews or grandnephews, those only can take any shares who answer that description (*q*). Again, if the power be to appoint portions amongst younger children, nothing can be taken by a younger son who afterwards becomes the eldest by the decease of his elder brother (*r*); although if he should have actually received any share in the money whilst a younger son, he will not be obliged to refund it on becoming the eldest (*s*). The word "younger," however, is not, in the construction of such powers, taken literally, but as meaning any child who may not be entitled to the family estate. Therefore a daughter who may be the eldest child would be considered as a proper object of a power to appoint amongst the younger children, whilst her younger brother, being the eldest son entitled to the family estate, would not be allowed to participate (*t*). And a power to appoint amongst children living at their father's decease includes a child *en ventre sa mere* (*u*).

Nephews.

Younger children.

Child *en ventre sa mere*.

In some cases where the power only authorizes an appointment amongst children, an appointment in favour of the issue of a child may be sustained as being, in effect, first an appointment to the child, and then an assignment by such child in favour of his issue (*x*). But this of course can only be done when the child is of age, and is a party to and executes the deed by which

When an appointment to the issue of a child is good.

(*p*) *Alexander v. Alexander*, 2 Ves. sen. 640; *Bristow v. Warde*, 2 Ves. jun. 336.

(*q*) *Falkner v. Butler*, Amb. 514; *Waring v. Lee*, 8 Beav. 247.

(*r*) *Chudwick v. Doleman*, Vern. 528; *Lord Teynham v. Webb*, 2 Ves. sen. 198.

(*s*) 2 Sug. Pow. 293.

(*t*) *Pierson v. Garnet*, 2 Bro. C. C. 38; *Heneage v. Hunloke*, 2 Atk. 456; *Beale v. Beale*, 1 P. Wms. 244.

(*u*) *Beale v. Beale*, 1 P. Wms. 244.

(*x*) *Routledge v. Dorvil*, 2 Ves. jun. 357; *West v. Berney*, 1 Russ. & My. 431, 439; *Goldsmid v. Goldsmid*, 2 Hare, 187.

the appointment is made. And the more regular plan, in such cases is, for the father first to make the appointment in favour of the child, and then for the child to make an assignment of the fund appointed, to trustees in trust for his children in the manner intended.

Appointment
by a father
must not be for
his own benefit.

Fraud on the
power.

An appointment by a father in favour of his child, in exercise of a power for that purpose, ought to be made for the benefit of the child who is the object of the provision, and not indirectly for the benefit of the father who makes the appointment. Accordingly, any bargain between the father and the child by which the former is to receive any advantage for exercising his power will be considered as, in technical phrase, a fraud on the power, and will render the appointment void (*y*). But when there is no evidence that the appointment is made under a bargain for the benefit of the father, although there may be strong suspicion that such is the case, the appointment cannot be set aside (*z*). Powers of appointment amongst children usually enable the parent to fix the age or time at which the fund appointed shall vest in any child. But, on the principle just stated, a father will not be allowed to make an immediate appointment to an infant child, for the sake of becoming himself entitled to the fund appointed, as the child's personal representative in the event of its decease (*a*). An appointment to an infant is not, however, necessarily void on account of the circumstance that the father, who has made the appointment, will

(*y*) *Daubency v. Cockburn*, 1 Meriv. 626; *Palmer v. Wheeler*, 2 Ball & Beatty, 18; *Jackson v. Jackson*, 1 Dru. 91; *Thompson v. Simpson*, 2 Jones & Lat. 110.

(*z*) *McQueen v. Farquhar*, 11 Ves. 467; *Hamilton v. Kirwan*,

2 Jones & Lat. 393; *Campbell v. Home*, 1 You. & Coll. N. C. 661.

(*a*) *Cunynghame v. Thurlow*, 1 Rus. & M. 436; *Lord Sandwich's case*, cited 11 Ves. 479; *Gee v. Gurney*, 2 Coll. 486.

become entitled to the property appointed in the event of the child's decease (b).

In the exercise of powers of appointment amongst children, care should be taken not to postpone the vesting of their shares to a period which may exceed the limits allowed by the law of perpetuity (c). When the power of appointment is a general power, enabling the appointor to make a disposition in favour of any object he may please, the property is evidently not tied up so long as such a power exists over it; and neither the reason nor the rule which forbids a perpetuity has any application, till some settlement is made in exercise of such a power. In such a case, therefore, the limits of perpetuity commence from the time of the appointment (d). But where the power of appointment is to be exercised only in favour of a particular class of objects, the property subject to the power is evidently already tied up in favour of that class. The limits of perpetuity are therefore in this case to be reckoned, not from the time of the exercise of the power, but from the date of its creation. The interests given by the power must, for this purpose, be regarded as if they had been inserted in the settlement by which the power was created; and if such interests would have been too remote if inserted in the original settlement, they will be too remote when given in exercise of the power (e). Thus a person having a general power of appointment by will over a fund, may by his will appoint a share of it in favour of any unborn child of his own, to be vested in such child on his attaining the age of twenty-three years. The limit of perpetuities is reckoned from the time of the appointment, which in this case is the death of the ap-

Perpetuity to be avoided in the exercise of powers.

(b) *Butcher v. Jackson*, 14 Sim. 444. (e) Co. Litt. 271 b, n. (1), vii. 2; 1 Sug. Pow. 498; *Routledge v. Dorril*, 2 Ves. jun. 357.

(c) See *ante*, p. 194.

(d) 1 Sug. Pow. 249, 495.

pointor, when his will begins to take effect. The child must necessarily then be born; and the child's life is accordingly the life then in being within which the share must necessarily vest. But if by a marriage settlement a fund be settled in trust for the father for his life, and after his decease in trust for the children, in such shares as he shall appoint by his will, he cannot make an appointment in favour of any unborn child, to be vested on his attaining the age of twenty-three years. For in this case the limit of perpetuities counts from the date of the settlement, when the property was first tied up for the benefit of the children; and this limit would be exceeded if the child should not attain the given age within twenty-one years after the decease of the father, who was the life in being at the date of the settlement. And the rule is, that every limitation which *may* exceed in duration a life or lives in being, and twenty-one years afterwards (allowing for the period of actual gestation), is void as tending to a perpetuity (*f*).

The courts lean
to vested in-
terests.

When personal property is directed to be paid to any persons at a future time, the leaning of the courts is always in favour of vested interests; that is to say, the courts lean to that construction which will give to the parties a present assignable and transmissible right to that which is not payable till a future time. Thus if a legacy be given to a person to be payable when he attains the age of twenty-one years, the legacy is considered to be immediately vested, and will accordingly be payable to the administrator of the legatee in case he should die under age (*g*). So if personal estate be settled in trust for A. for life, and after his decease for all his children in equal shares, each of his children will be entitled to a share, whether such child survive his parent or not, and although such child should die in

(*f*) See Principles of the Law
of Real Property, 242.

(*g*) 2 Black. Comm. 513; Co-
Litt. 237 a, note (1).

infancy (*h*). If, however, the property should consist of money charged on land or other real estate, such as the portions of younger children when the family estate is entailed on the eldest son, the rule is different; and if any of the children should die before the time when his or her portion becomes payable, it will sink into the land for the benefit of the estate (*i*).

Vesting of portions charged on land.

In the settlement of personal property upon children there are two plans, either of which may be adopted with respect to the vesting of the interests given. The one plan is, to vest the interests of the children in them immediately as they come into being, divesting from each of them proportionate shares as others are born, and also divesting their shares altogether in favour of the others, in the event of the decease of any child under age, or of a daughter under age, and without having been married. The other plan is, to vest the interests given, only in those who, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry under it. So far as the corpus of the fund is concerned, the result of each of these plans is the same, the property being ultimately divided only amongst those children who, being sons, live to come of age, or, being daughters, come of age or previously marry. But with regard to the income of the fund the plans are different. In the first case, the income belongs to the children whilst under age; but in the second no interest either in the income or in the principal is given during minority, or, in the case of daughters, until marriage under age. In the first case, therefore, if the father be dead, the income will be payable to the guardian of the children toward their maintenance and education; but in the second case there will be no provision for these purposes in the absence of express directions. Such

Vesting of interests given to children.

Maintenance and education.

(*h*) *Skey v. Barnes*, 3 Mer. 335; 267.
Templeton v. Warrington, 13 Sim.

(*i*) Co. Litt. 237 a, n. (1).

directions therefore should in such case be always inserted, with a provision for the accumulation of the surplus income by way of increase of the principal. If however the whole property is ultimately to go amongst the children (*h*), or if the persons entitled, in the event of the children not living to attain vested interests, should agree (*l*), the Court of Chancery will direct the income to be applied for the children's maintenance, in the absence of sufficient provision for that purpose, and even in the face of an express direction to accumulate the income (*m*).

Maintenance of children in their father's lifetime.

In marriage settlements a life interest is usually and properly given to the father and mother, so that no provision is required for the maintenance of the children until after the decease of the survivor. And where life interests are not given to the parents, but provision is made for the maintenance of the children during the father's lifetime out of the settled fund, such provision is considered as primarily applicable for the maintenance of the children accordingly (*n*). But the general rule is, that every father is bound to maintain his children, if of ability so to do (*o*); and a provision contained in a gift to an infant child, for his maintenance and education, will not be allowed to be applied for that purpose during his father's lifetime, if the father is able to maintain him in a manner suitable to his condition and prospects (*p*). When, therefore, it is intended that the income of pro-

(*k*) *Haley v. Bannister*, 4 Mad. 275; *Errat v. Barlow*, 14 Ves. 202.

(*l*) *Turner v. Turner*, 4 Sim. 430; *Cummings v. Flower*, 7 Sim. 523.

(*m*) *Greenwell v. Greenwell*, 5 Ves. 194.

(*n*) *Stocken v. Stocken*, 4 Sim. 152; *Meacher v. Younge*, 2

Myl. & K. 490. See *Thompson v. Griffin*, 1 Craig & Phillips, 317.

(*o*) *Andrews v. Partington*, 3 Bro. C. C. 60.

(*p*) *Maberly v. Turton*, 14 Ves. 499; *Jervoise v. Silk*, G. Cooper, 52; *Ex parte Williams*, 2 Collier, 740.

perty given to children should be applied to their maintenance during their father's lifetime, without reference to his ability to maintain them, the application of the income, without reference to his ability, should be expressly authorized; and, if such application be authorized, the income may of course be applied accordingly(*q*). When two funds are provided for the maintenance of an infant, it is frequently difficult to decide to which fund recourse should be first had. The general rule is, that the interest of the infant determines the order of application(*r*); but, in order to avoid questions, it is very desirable, when two funds are provided for an infant's maintenance, to direct that one of them shall be in aid only of the provision afforded by the other.

When two funds are provided for maintenance.

In settlements of personal property it is usual to provide for the investment of the funds settled in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England or Wales, but not in Ireland. Government securities, as distinguished from stocks or funds, seem to be nothing else than Exchequer bills, in which trustees appear to be justified, even without express authority, in investing the property for any temporary purpose, as during the necessary delay in completing a contemplated mortgage security(*s*). But where a permanent investment is intended, a trust to lay out money in government securities will not authorize the purchase of Exchequer bills(*t*). Real security means the mortgage of real estate, namely, freehold or copyhold hereditaments of sufficient value. And if it be desired that the trustees should have power to invest the trust money on

Investment of settled funds.

Government securities.

Real security.

(*q*) See *Wetherell v. Wilson*, 1 Keen, 80.

(*s*) *Matthews v. Brise*, 6 Beav. 239, 244.

(*r*) *Foljambe v. Willoughby*, 2 Sim. & Stu. 165; *Lygon v. Lord Corcutry*, 14 Sim. 41.

(*t*) *Ex parte Chaplin*, 3 You. & Coll. 397.

Real securities
in Ireland.

mortgage of leasehold estates, or in railway debentures, or shares, or any other securities, or to lend it to any party on his bond, express authority ought to be given to the trustees for the purpose. Investments in Ireland are generally expressly prohibited, on account of a recent act of parliament, which empowers trustees, who are authorized by their trust to lend money at interest on real securities in England, Wales or Great Britain, to lend the same at interest on real securities in Ireland (*u*). But all loans of money on real securities in Ireland under the act, in which any minor or unborn child, or person of unsound mind, may be interested, must be made by the direction and under the authority of the Court of Chancery in England, to be obtained in any cause, or upon petition in a summary way (*x*); and every such loan must be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales or Great Britain, testified in the manner required by the trust (*y*). And it is also provided that the act shall not apply to cases where there is an express restriction against the investment of the trust money on securities in Ireland (*z*).

Consent to
change of in-
vestments.

The consent of the persons for the time being entitled to the income of the property is generally required in settlements, to any change of investment which the trustees may be authorized to make; and this consent is sometimes required to be in writing, and occasionally to be testified by deed. Where consent is required, it must be given previously to or at the time of the change of investment (*a*); for as the consent is required as a

(*u*) Stat. 4 & 5 Will. IV. c. 29.

(*z*) Sect. 5.

(*x*) Sect. 2. *Ex parte French*,
7 Sim. 502; *Ex parte Lord Wil-*
liam Pawlett, 1 Phill. 570.

(*a*) *Bateman v. Davis*, 3 Madd.
98; *Greenham v. Gibbeson*, 10
Bing. 363.

(*y*) Sect. 4.

check upon the trustees, a subsequent consent, where the mischief may be done, is evidently unavailing. The person whose consent is required is not, however, the sole judge of the propriety of any change of investment: the trustee, by virtue of his office, has also a discretion; and if he should consider the investment ineligible, he may refuse to make it, although requested so to do by the person whose consent ought to be obtained (*b*). But the terms of the instrument may require the trustees to change the investments at the request of any given person; and in this case they will generally be bound to act accordingly, unless the circumstances of the case should be such as were evidently not contemplated when the settlement was made (*c*).

In settlements of personal property, authority is sometimes given to the trustees to make investments in the purchase of landed estates. As land devolves in a different manner from personal property, it is obvious that a simple change of the property from personalty to land would in many cases materially disarrange the destination of the property. Thus if a person entitled under the settlement to a reversionary interest in the settled fund, should have died intestate, his administrator would be entitled to such interest so long as the property continued to be personal, but, on its being changed into real estate, it would shift to his heir at law. In order to obviate this inconvenience, it is so contrived that the lands to be purchased should, from the moment the purchase is made, be considered as personal property. To effect this object, the lands when purchased are directed to be held by the trustees upon trust to sell them, with the consent of the equitable tenants for life, during their lives, and after their decease at the discretion of the

Investment of settled money in the purchase of lands.

(*b*) *Tee v. Young*, 2 You. & Coll. N. C. 532.

(*c*) *Boss v. Godsall*, 1 You. & Coll. N. C. 617.

trustees (*d*). This trust for sale converts the lands into money in the contemplation of equity; for it is a rule of equity, that whatever is agreed to be done shall be considered as done already. In the words of Sir Thomas Sewell (*e*), "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." And if land is clearly directed to be sold, the circumstance that the consent of some person or persons is required to the sale will not prevent the immediate conversion of the land into money in the contemplation of equity, although such a circumstance may often cause a long postponement of the period of its actual conversion (*f*). Notwithstanding a trust for the sale of land, if all the parties interested should be of full age (*g*), and if females unmarried (*h*), they may elect that the land shall not be sold; and after such election the land will be considered as real estate in equity as well as at law (*i*). And the election of the parties need not be expressed in so many words, but may be inferred from any acts by which their intention is clearly shown (*j*).

Election that
land should not
be sold.

(*d*) See Appendix C.

102.

(*e*) In *Fletcher v. Ashburner*,
1 Bro. C. C. 499, approved by
Lord Alvanley in *Wheldale v.*
Partridge, 5 Ves. 396, 397.

(*h*) *Oldham v. Hughes*, 2 Atk.
452.

(*i*) *Davies v. Ashford*, 15 Sim.
42.

(*f*) See *Lechmere v. Earl of*
Carlisle, 3 P. Wms. 218, 219.

(*j*) *Lingen v. Sowray*, 1 P.
Wms. 172; *Cookson v. Reay*, 5

(*g*) *Van v. Barnett*, 19 Ves.

Beav. 22; 12 Cl. & Fin. 121.

All properly drawn settlements of personal estate contain a power for the trustees or trustee for the time being, acting in the execution of the trusts, to give receipts for any money payable to them or him under the trusts, which receipts, it is declared, shall effectually discharge the persons paying the money from all responsibility as to its application. The necessity of this provision arises from a rule of equity, by which any person who pays money to another, whom he knows to be merely a trustee, is bound to see the money applied according to the trusts(*k*). If, however, the trusts should be of such a kind as to require time and discretion to carry them into effect, the receipt of the trustees will, from the nature of the case, be an effectual discharge, without an express clause for this purpose (*l*). Receipt clause.

Every settlement, the trusts of which are likely to be of long duration, should contain a power of appointing new trustees in the event of any trustee dying, desiring to be discharged, refusing, or becoming incapable to act in the execution of the trusts(*m*). And as the mere appointment of a trustee will not be sufficient to vest the trust property in him, it is usual and proper to direct that, on every such appointment, the trust property shall be so conveyed, assigned, transferred, or paid as effectually to vest the same in the new trustee jointly with the surviving or continuing trustees, or solely as the case may require. Every new trustee should also be invested with the same powers as the original trustees. A mere power to appoint a new trustee does not, however, render such appointment imperative; and in case of the death of any trustee, the survivors or survivor Power to appoint new trustees.

(*k*) *Spalding v. Shalmer*, 1 Vern. 301; *Lloyd v. Baldwin*, 1 Ves. sen. 173. *Swanst. 699; Balfour v. Weland*, 16 Ves. 151.

(*m*) See Appendix C.

(*l*) *Doran v. Wiltshire*, 3

may still carry on the ordinary business of the trust (*n*). When a trustee has once accepted the office, he has no right to retire, unless the person having the power to appoint another trustee in the event of his retiring, should consent to do so (*o*); or unless, from unforeseen circumstances, the duties of the trust should have become more onerous than was contemplated by the trustee when he accepted the office (*p*).

Trustee's costs
and responsi-
bilities.

Solicitor cannot
charge for pro-
fessional
trouble.

The office of trustee of a settlement is one involving great responsibility, and frequently much trouble, without any remuneration; for a trustee is not allowed to make a profit of his trust. And if he be a solicitor, he cannot receive payment for his professional trouble incurred in the business of the trust (*q*), unless he expressly stipulate before accepting the office, that he shall be permitted to do so (*r*), or unless his charges be voluntarily paid by the cestui que trust with full knowledge that they might have been resisted (*s*). But a trustee may charge against the trust property all costs and expenses properly incurred in the conduct of the trust; and in the event of a suit, he is allowed his full costs, as between solicitor and client (*t*). But his right to costs may be forfeited by his negligence or misconduct (*u*); or he may even be made to pay the costs of the other parties (*x*). As the trustee has the legal title to the property, he is often enabled, if fraudulently

(*n*) *Warburton v. Sandys*, 14 Sim. 622.

(*o*) *Adams v. Paynter*, 1 Coll. 532.

(*p*) *Coventry v. Coventry*, 1 Keen, 758.

(*q*) *Moore v. Frowd*, 3 My. & Craig, 45; *Fraser v. Palmer*, 4 You. & Coll. 515; *Collins v. Carey*, 2 Beav. 128; *Bainbrigge v. Blair*, 8 Beav. 588; *Todd v.*

Wilson, 9 Beav. 486.

(*r*) *Re Sherwood*, 3 Beav. 388.

(*s*) *Stanes v. Parker*, 9 Beav. 385.

(*t*) 2 Fonb. Eq. 176.

(*u*) *Campbell v. Campbell*, 2 My. & Craig, 25; *Howard v. Rhodes*, 1 Keen, 581.

(*x*) *Wilson v. Wilson*, 2 Keen, 249; *Willis v. Hiscor*, 4 My. & Craig, 197.

inclined, to sell it or spend it for his own benefit. It is therefore highly proper that his conduct should be narrowly scrutinized, and that he should be invariably punished for any breach of faith. But the Court of Chancery goes further than this, and punishes, with almost equal severity, his neglect of duties, which in many cases he scarcely knows that he has undertaken. Thus, if a trustee, by his negligence or misplaced confidence in his co-trustee, gives him an opportunity to commit a breach of trust, of which opportunity the co-trustee avails himself, the innocent trustee will be made to replace the whole of the fund abstracted by the other(y). So if the trustee should depart from the letter of his trust, as by investing the trust fund on an unauthorized security, although at the importunity of some of the parties interested, and with a bonâ fide desire to benefit them all, he will be answerable for any loss which such departure may have occasioned(z). And if, being ignorant of law, he should give himself up entirely to his professional adviser, he may still suffer from the mistake of his solicitor or conveyancer(a); and in such a case he will scarcely perhaps see the justice of the remark that he might (had he known how) have chosen a wiser solicitor, or a more learned counsel(b). In all ordinary settlements, clauses are inserted for the indemnity and reimbursement of trustees, to the effect that they shall not be answerable the one for the other of them, or for signing receipts for the

(y) *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; *Brice v. Stokes*, 11 Ves. 319; *Hanbury v. Kirkland*, 3 Sim. 265; *Booth v. Booth*, 1 Beav. 125; *Broadhurst v. Balguy*, 1 You. & Coll. N. C. 16.

497; *Watts v. Girdlestone*, 6 Beav. 188.

(z) *Driver v. Scott*, 4 Russ. 195; *Pride v. Fooks*, 2 Beav. 430; *Forrest v. Elwes*, 4 Ves.

(a) *Willis v. Hiscov*, 4 My. & Craig, 197; *Angier v. Stannard*, 3 My. & Keen, 566; *Hampshire v. Bradley*, 2 Coll. 34. See however *Poole v. Pass*, 1 Beav. 600; *Holford v. Phipps*, 3 Beav. 434; 4 Beav. 475.

(b) 3 My. & Keen, 572.

sake of conformity, or for involuntary loss; and that they may reimburse themselves out of the trust funds all costs and expenses incurred in relation to the trust (c). But these clauses, though often very highly valued by trustees, really afford them little, if any, further protection than they would be entitled to, if left to the ordinary rules of equity.

Act for better securing trust funds and the relief of trustees.

In order to provide means for securing trust funds, and for relieving trustees from the responsibility of administering them, an act of parliament has recently been passed (d) whereby all trustees, executors, administrators, or other persons having in their hands any monies belonging to any trust whatsoever, or the major part of them, may pay the same, with the privity of the accountant-general of the Court of Chancery, into the Bank of England, to the account of such accountant-general in the matter of the trust, in trust to attend the orders of the court. Bank annuities, East India and South Sea stock, and government and parliamentary securities held upon trust may also be transferred or deposited in like manner. The trust is then administered by the court upon petition in a summary way, without a bill, unless the court direct any suit to be instituted (e).

Covenants for settlement of wife's future property.

In some marriage settlements, in addition to the settlement actually made, a covenant is inserted for the settlement of all such property as the intended wife shall become entitled to during the coverture or marriage. It sometimes happens that at the time when such covenant is entered into, the wife is, without being aware of it, entitled to other property, besides that actually settled. In such a case, the general rule is that the property, to which she is then entitled, is sub-

(c) See Appendix C.

(e) Sect. 2.

(d) Stat. 10 & 11 Vict. c. 96, s. 1.

ject to the covenant, and ought to be settled, as well as that which she may subsequently acquire (*f*). But as the question is entirely one of intention, if the property to which the wife is entitled appear to have been purposely omitted, it will not be bound by such a covenant (*g*). If the covenant to settle the wife's future property be entered into by the intended husband alone, the wife will not be bound to settle any future property to which she may become entitled for her separate use (*h*). Occasionally covenants are unadvisedly entered into by the intended husband to settle on his children, or to leave to them by his will, all the property that he may acquire during the coverture, or all his property generally (*i*). So a father may covenant, on the marriage of his daughter, to leave her as great a share in his property as to any of his other children (*k*). These covenants will be enforced in equity; but from their vague and uncertain character, they are likely to lead to much litigation. A covenant to settle property of a given amount by a certain day appears to create a lien in equity on all the property of the kind covenanted to be settled, to which the covenantor may become entitled before that day (*l*). But a covenant to settle property of a given value, when no time is limited for its performance, creates no lien on any of the property of the covenantor (*m*).

Covenants to settle husband's property.

(*f*) *Graffley v. Humpage*, 1 Beav. 46; *James v. Durant*, 2 Beav. 177; *Blythe v. Granville*, 13 Sim. 190.

(*g*) *Hoare v. Horaby*, 2 You. & Coll. N. C. 121.

(*h*) *Douglas v. Congreve*, 1 Keen, 410; *Travers v. Travers*, 2 Beav. 179; *Drury v. Scott*, 4 You. & Coll. 264.

(*i*) *Lewis v. Madocks*, 17 Ves. 48; *Needham v. Smith*, 4 Russ.

318; *Needham v. Kirkman*, 4 Barn. & Ald. 531.

(*k*) *Willis v. Black*, 4 Russ. 170; *Clegg v. Clegg*, 2 Russ. & My. 570.

(*l*) *Roundell v. Breary*, 2 Vern. 482; *Wellesley v. Wellesley*, 4 My. & Cr. 561, 581.

(*m*) *Freemoult v. Dedire*, 1 P. Wms. 429; *Berrington v. Evans*, 3 You. & Coll. 384.

Marriage settlement equally valid as a purchase.

Voluntary settlement void as against creditors.

Marriage, as we have seen (*n*), is a valuable consideration. Every settlement, therefore, made by parties of full age, previously to and in consideration of marriage, or made subsequently to marriage in pursuance of written articles (*o*), stands on the footing of a purchase, and has equal validity. But a voluntary settlement is liable to be defeated by the creditors of the settlor, if he was so much indebted at the time as to bring the settlement within the provisions of the statute of the 13th of Elizabeth (*p*) already noticed (*q*), by which the alienation of goods and chattels made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them. For although by the phrase "goods and chattels" was intended only such personal property as could be taken by the sheriff under an execution on a judgment (*r*), yet as almost all kinds of personal property may now be taken in execution (*s*), or charged with the payment of judgment debts (*t*), it would seem that all such property is now within the compass of the statute. The voluntary assignment of goods or chattels, or delivery or making over of bills, bonds, notes or other securities, or the voluntary transfer of any debts made by a person being at the time insolvent (*u*), is also void in the event of his bankruptcy (*x*). This provision appears to embrace all personal estate capable of assignment or transfer (*y*); but it does not extend to a gift of money (*z*).

(*n*) *Ante*, p. 63.

(*o*) Stat. 29 Car. II. c. 3, s. 4.
See *ante*, p. 67.

(*p*) Stat. 13 Eliz. c. 5.

(*q*) *Ante*, p. 43.

(*r*) *Sims v. Thomas*, 2 Adol. & Ell. 536. See *ante*, p. 45.

(*s*) Stat. 1 & 2 Vict. c. 110, s. 12. See *ante*, p. 102.

(*t*) Stat. 1 & 2 Vict. c. 110, s. 11; 3 & 4 Vict. c. 82, s. 1.

Ante, pp. 102, 155, 170.

(*u*) See *Cullen v. Sanger*, 2 You. & Jerv. 459.

(*r*) Stat. 6 Geo. 4, c. 16, s. 73.

(*y*) *Brown v. Bellaris*, 5 Mad. 53.

(*z*) *Ex parte Shortland*, 7 Ves. 88; *Kensington v. Chandler*, 2 Mau. & Selw. 36; *Ex parte Skerrett*, 2 Rose, 381.

Although a voluntary settlement may thus be defeated by creditors, yet, when once completed, it is binding on the settlor, who cannot, by any means, undo it (*a*). Thus, in one case (*b*), a maiden lady, not immediately contemplating marriage, but thinking such an event possible, transferred a sum of stock into the names of trustees in trust for herself until she should marry, and, after her marriage, in trust for her separate use for her life, free from the control of any person or persons with whom she might intermarry, and after her decease, upon trusts for the benefit of any such husband, and her child or children by any husband or husbands. She afterwards, being still unmarried, filed a bill in Chancery, praying that the settlement might be delivered up to her to be cancelled, and that the stock might be ordered to be retransferred by the trustees. But the court held that she was bound by the settlement she had made, and was not entitled to any assistance to release her from it.

Voluntary settlement binding on the settlor.

If however the object of the settlor is merely his own benefit or convenience, the settlement will be revocable by him at his pleasure. Thus where a man, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, his object is said to be, not to benefit his creditors, but to benefit himself by the payment of his debts (*c*). He may accordingly revoke the trust thus created (*d*), so long as the creditors remain in

Settlement for settlor's own benefit revocable by him.

(*a*) *Ellison v. Ellison*, 6 Ves. 656; *Edwards v. Jones*, 1 My. & Craig, 226.

(*b*) *Bill v. Cureton*, 2 My. & Keen, 403; see also *Petre v. Espinasse*, 2 My. & Keen, 496.

(*c*) *Per* Sir C. Pepys, M.R., 2 My. & Keen, 511, cited by Wig-

ram, V.C. in *Hughes v. Stubbs*, 1 Hare, 479.

(*d*) *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 My. & Keen, 492; *Ravenshaw v. Hollier*, 7 Sim. 3; *Law v. Bagwell*, 1 Dru. & Warren, 398.

ignorance of it (*e*). This rule, however, though well established, seems to attribute to debtors a somewhat light estimation of the claims of their creditors; and there appears to be no disposition in the courts to extend it (*f*).

Voluntary settlements of personal estate not void against subsequent purchasers.

The statute of Elizabeth (*g*), by which voluntary settlements of lands and other hereditaments are void against subsequent purchasers for valuable consideration, though it extends to chattels real (*h*), does not apply to purely personal estate (*i*). A voluntary settlement of personal estate cannot therefore be defeated by a subsequent sale of the property by the settlor.

Stamps on settlements.

Settlements of any definite and certain principal sum of money, or share in the funds, or Bank, East India, or South Sea stock, are liable to an ad valorem duty, according to the amount of the money or the value of the stock or shares settled (*k*); and every duplicate of such settlement is also liable to the same duty. X

(*e*) *Browne v. Cavendish*, 1 Jones & Lat. 606, 635.

(*f*) See *Wilding v. Richards*, 1 Coll. 661; *Simmonds v. Palles*, 2 Jones & Lat. 489; *Kirwan v. Daniel*, 5 Hare, 493, 499—501.

(*g*) Stat. 27 Eliz. c. 4; Principles of the Law of Real Property, 56.

(*h*) Co. Litt. 3 b; 6 Rep. 72.

(*i*) 2 My. & Keen, 512.

(*k*) The following is the table.
If the same do not amount to 1000*l.*, 1*l.* 15*s.*; amounting to 1000*l.* and not to 2000*l.*, 2*l.*; amounting to 2000*l.* and not to

3000*l.*, 3*l.*; amounting to 3000*l.* and not to 4000*l.*, 4*l.*; amounting to 4000*l.* and not to 5000*l.*, 5*l.*; amounting to 5000*l.* and not to 7000*l.*, 7*l.*; amounting to 7000*l.* and not to 9000*l.*, 9*l.*; amounting to 9000*l.* and not to 12,000*l.*, 12*l.*; amounting to 12,000*l.* and not to 15,000*l.*, 15*l.*; amounting to 15,000*l.* and not to 20,000*l.*, 20*l.*; amounting to 20,000*l.* or upwards, 25*l.*

The progressive duty for every entire quantity of 1080 words beyond the first 1080, is 1*l.* 5*s.* —

CHAPTER II.

OF JOINT OWNERSHIP AND JOINT LIABILITY.

THERE may be a joint ownership of any kind of personal property in the same manner as there may be a joint tenancy of real estate (*a*); and the four unities of *possession, interest, title, and time*, which characterize a joint tenancy of real estate, apply also to a joint ownership of chattels. But as no estates can exist in personal property, the distinctions which hold with respect to joint estates for life, in tail, or in fee, do not occur in a joint ownership of personalty. If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner. Hence it follows, that if a bond or covenant be given or made to two or more jointly, they must all join in suing upon it (*b*); and a release by one of them to the obligor is sufficient to bar them all (*c*). As a further consequence of the unity of a joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject of the joint ownership be a chattel real as a lease, or a chose in possession as a horse, or a chose in action as a debt or legacy, the surviving joint owner will be entitled to the whole, un-

Joint owners.

Joint bond, all must sue.

Release by one bars all.

Survivorship.

(*a*) See Principles of the Law of Real Property, part 1, c. 6, p. 99. *Petrie v. Bury*, 3 Barn. & Cres. 353; 1 Wms. Saund. 291 i.

(*c*) 2 Rol. Abr. 410 (D), pl.

(*b*) *Slingsby's case*, 5 Rep. 18 b; 1, 5.

affected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties (*d*). And for this reason, trustees of settlements of personal estate are always made joint owners, in order that the surviving trustees may take the entire fund, rather than that the executors or administrators of any trustee who may happen to die should have any right to intermeddle with the share of the deceased.

Trustees of personal estate made joint owners.

The shares of joint owners under a will need not vest at the same time.

If the joint ownership be created by a will, it is not necessary that the shares of all the joint owners should vest at the same time. Thus under a bequest to A. for life, and after his decease to the issue (*e*) or children (*f*) of B., without words of severance, all the issue or children, born in A.'s lifetime, will become entitled jointly, though some may not be living when the shares of the others become vested interests. On the decease of any of them therefore before payment, the survivors will become entitled to their shares. A similar exception to the unity of *time* occurs also in the case of a devise of real estate by will (*g*).

Limitation to joint owners, their executors, administrators, and assigns.

In analogy to the rule by which a joint estate in fee-simple in lands is created by a limitation to two or more, *their heirs and assigns*, it is customary with conveyancers to make a gift of personal estate to two or more jointly, by limiting it to them *their executors, administrators, and assigns*. This, however, though usual, is not strictly necessary. In ill-framed instruments, limitations of personalty are sometimes made to

- (*d*) Litt. sects. 281, 282; *Fady* 645.
Shore v. Billingsley, 1 Vern. 482; (*f*') *Amies v. Skillern*, 14 Sim.
Willing v. Baine, 3 P. Wms. 128.
115; *Morley v. Bird*, 3 Ves. 629. (*g*) See Principles of the Law
(*e*) *Bridge v. Yates*, 12 Sim. of Real Property, 102.

two persons, "and the survivor of them, and the executors and administrators of such survivor." If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor. Bonds and covenants, when intended to be given or made to two or more jointly, are in like manner usually given or made to the obligees or covenantees, *their executors and administrators*; or if the subject-matter be assignable, to them, *their executors, administrators, and assigns*. But when entered into with two or more persons, bonds or covenants cannot, as respects the obligees or covenantees, be joint or several, at their election, for one and the same cause; for otherwise the court would be in doubt for which of them to give judgment (*h*). And whether a covenant be joint or several depends much more upon the subject-matter than upon the words employed. If each of the covenantees has a separate interest, each may have a separate cause of action, and the covenant will accordingly in such a case be several, though expressed to be made with the covenantees jointly and severally (*i*). But if each of the covenantees has not a separate cause of action, all of them must concur in suing upon the covenant, even although it be expressed to be made with some of them, "and as a separate covenant" with the others (*k*); for if all may sue, all must (*l*).

Joint bonds and covenants.

Joint or several.

An exception to the right of survivorship between joint owners occurs in the case of partners in trade. In this case the law, in order to the encouragement of commerce, vests in the executors or administrators of a

Partners in trade, no survivorship of choses in possession.

(*h*) 5 Rep. 19 a; 1 East, 501. B. 197; *Hopkinson v. Lee*, 6 Q.

(*i*) 5 Rep. 19 a; 1 Wms. B. 964; *Bradburne v. Botfield*, 14 Mee. & Wels. 559; *Wakefield v. Brown*, Q. B. 10 Jurist, 853.

(*k*) *Slingsby's case*, 5 Rep. 18 b; *Anderson v. Martindale*, 1 East, 497; *Foley v. Addenbrooke*, 4 Q. (l) 1 Q. B. 208.

Otherwise as to
choses in action
at law.

But not in
equity.

Real estate
purchased for
partnership
purposes.

Joint owner-
ship not fa-
voured in
equity.

No survivor-
ship in equity
of joint secu-
rities.

deceased partner, the share of the deceased in all personal chattels in possession, such as merchandize or ships, which were the joint property of the partnership (*m*). But this rule does not extend at law to *choses in action*, which must accordingly be sued for in the name of the survivor (*n*). In equity, however, the share of the deceased partner, both in the choses in possession and in action belonging to the partnership, devolves on his executors or administrators. The consequence is that, though the choses in action must be sued for by the surviving partner, he will be a trustee of the share of the deceased partner for his executors or administrators (*o*). The same rule is applied in equity even to real estate purchased for the purposes of a trading partnership (*p*), and conveyed to the partners as joint tenants in fee. On the decease of any of them, equity holds the survivors to be trustees of the share of the deceased for his executors or administrators as part of his personal estate (*q*).

Indeed, as a general rule, joint ownership is not favoured in equity, on account of the right of survivorship which attaches to it (*r*). If therefore two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the re-

(*m*) *Co. Litt.* 182 a; *Kempe v. Andrews*, 3 *Lev.* 290; *Rex v. Collector of Customs*, 2 *Mau. & Selw.* 223.

(*n*) *Martin v. Crompe*, 1 *Lord Raym.* 310; *S. C.* 2 *Salk.* 441; 2 *Wms. Saund.* 117 b, n. (2).

(*o*) *Jeffereys v. Small*, 1 *Vern.* 217; *Lake v. Craddock*, 3 *P. Wms.* 158.

(*p*) *Randall v. Randall*, 7 *Sim.* 271.

(*q*) *Phillips v. Phillips*, 1 *My. & Keen*, 649, 663; *Broom v. Broom*, 3 *My. & Keen*, 443; *Morris v. Kearsley*, 2 *You. & Coll.* 139; *Bligh v. Brent*, 2 *You. & Coll.* 258; *Houghton v. Houghton*, 11 *Sim.* 491; *Custance v. Bradshaw*, 4 *Hare*, 315, 322; see *Cookson v. Cookson*, 8 *Sim.* 529.

(*r*) 2 *Atk.* 55; 2 *Ves. sen.* 258.

presentatives of the deceased, of the share advanced by him(s). And when the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured (t).

An ownership in common (or, as it is usually styled in analogy to real estate, a tenancy in common) of chattels may arise either from the severance of a joint ownership, or from a gift to two or more to hold in common (u). As, however, a chose in action is inalienable at law, a joint ownership of a chose in action cannot be severed at law by either, or even by both, of the joint owners. Thus in case of the bankruptcy of a joint creditor, by which all his estate becomes vested in his assignees, an action against the debtor must be brought in the joint names of the assignees and the other joint creditors (x). And if two joint creditors should become bankrupt, the action must be brought in the joint names of all the assignees of both of them (y). A tenancy in common cannot in fact exist at law of a chose in action. A. may owe 20*l.* to B. and C. jointly, or he may owe 10*l.* to B. and 10*l.* to C.; but he cannot owe 20*l.* to B. and C. in common. If each has a several cause of action, each must sue separately. In equity, however, the case is different. Though B. and C. are joint owners at law, in equity they may be owners in common; and on the decease of either of them, his share may in equity belong to his representatives, instead of accruing beneficially to his companion. When a limitation is made by deed to two or more persons as tenants in common, there is very seldom any difficulty. But in wills, where

Ownership in common.

No tenancy in common at law of a chose in action.

Otherwise in equity.

Gifts by will which make a tenancy in common.

(s) *Petty v. Styward*, 1 Chan. Rep. 57; 1 Eq. Ca. Ab. 290.

(t) See *Principles of the Law of Real Property*, 342.

(u) *Litt. sec. 321.*

(r) *Thomason v. Frere*, 10 East, 418; see stat. 5 & 6 Vict. c. 122, s. 31.

(y) See *Hancock v. Heywood*, 3 T. Rep. 433.

173
175

greater indulgence is given to informal words, the rule is, that any words which denote an intention to give to each of the legatees a distinct interest in the subject of gift, will be sufficient to make them tenants in common. Thus a gift by will to two or more persons "equally to be divided" between them (*z*), or simply "between them (*a*)," or "in joint and equal proportions (*b*)," or "equally (*c*)" or "respectively (*d*)," or "to be enjoyed alike (*e*)," will make such persons tenants in common, and not joint tenants, as they would have been without the insertion of such words. In this respect the rule is the same whether the subject of the devise or bequest be real or personal estate (*f*).

Owners in common have merely a unity of possession.

Owners in common of personal estate, like tenants in common of lands, have merely a unity of possession: the interest of one may be larger or smaller than that of the other; one having, for instance, one-third, and the other, two-thirds of the property. So their title need not be the same, as one may have been originally a joint tenant with a third person, who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, which springs from a unity of interest and title, has accordingly no place between owners in common (*g*).

No survivorship.

Joint liability.

Connected with the subject of joint ownership is that of joint liability. Two or more persons may be jointly liable to the same debt or demand. In a joint bond,

(*z*) *Blisset v. Cranwell*, 1 Salk. 226; *Phillips v. Phillips*, 2 Vern. 430; 1 Eq. Ca. Abr. 292, pl. 6; 1 P. Wms. 31.

(*a*) *Lashbrook v. Cock*, 2 Mer. 70.

(*b*) *Ettricke v. Ettricke*, 2 Ambl. 656.

(*c*) *Leven v. Dodd*, Cro. Eliz. 443.

(*d*) 1 Atk. 580; 1 Ves. sen. 104.

(*e*) *Loveacres d. Mudge v. Blight*, Cowp. 352.

(*f*) See 2 Jarm. Wills, 161, *et seq.*

(*g*) Litt. sec. 321.

the obligors, according to the usual form, bind themselves, their heirs, executors and administrators jointly; and in a joint covenant, they, in like manner, covenant for themselves, their heirs, executors and administrators jointly. In every case of joint liability, each is liable for the whole debt (*h*), yet they are all, like joint owners, considered as one person. They must accordingly all be sued together during their joint lives (*i*); and a release to one of them will discharge them all (*k*). It is, however, provided by the Bankrupt Acts that the certificate of conformity of a bankrupt shall not discharge any person who was at the time of the bankruptcy jointly bound, or had made any joint contract, with the bankrupt (*l*). And if any person jointly liable upon any simple contract shall be discharged by the Statute of Limitations, but his co-contractor or co-contractors shall be liable by virtue of a new acknowledgment or promise, judgment may be given and costs allowed against the latter person or persons only (*m*). And if such person or persons shall plead in abatement that the other ought to be jointly sued, and it shall appear that he was discharged by the statute, the issue joined on such plea shall be found against such person or persons pleading the same (*n*). After the decease of any one joint debtor the survivors or survivor of them may still be sued for the whole debt, as though the deceased had had no share in it (*o*), and the estate of the deceased will be discharged from all liability (*p*). So if a judgment be obtained against two or more

Release of one discharges all.

Discharge by Bankrupt Acts.

Discharge by Statute of Limitations.

After the decease of one joint debtor the survivors solely liable.

(*h*) 1 Barn. & Ald. 35.

(*l*) Stat. 6 Geo. IV. c. 16, s.

(*i*) 1 Wms. Saund. 291 b, n.

121; 5 & 6 Vict. c. 122, s. 37.

(*k*).

(*m*) Stat. 9 Geo. IV. c. 14, s. 1.

(*k*) 2 Rol. Abr. 412 (G), pl.

(*n*) Sect. 2.

4; *Clayton v. Kynaston*, 2 Salk.

(*o*) *Richards v. Heather*, 1

574; 2 Wms. Saund. 47gg, n.

Barn. & Ald. 29.

(*i*); *Warwick v. Richardson*, 14 Sim. 281.

(*p*) *Richardson v. Horton*, 6 Beav. 185.

jointly, and one of them die, the personal estate of the survivor or survivors will be exclusively liable to be taken in execution, although the real estate of the deceased, being bound from the date of the judgment, must contribute equally with the real estate of the survivors (*q*).

Joint and several liability.

Form of a joint and several bond.

Form of a joint and several covenant.

A liability, however, may be both joint and several at the same time; and, as such a liability is more beneficial to the creditor, it is more usual than a liability which is simply joint. A joint and several bond runs in this form:—"for which payment to be well and truly made, we bind ourselves, and each of us, and the heirs, executors and administrators of us, and of each of us, jointly and severally;" or, if there be a larger number of obligors, say five, the better form is:—"for which payment to be well and truly made, we bind ourselves, and each of us, and any two, three or four of us, and the heirs, executors and administrators of us, and of each of us, and of any two, three or four of us, jointly and severally." In this case, an action may be brought against all the obligors, or against any one, two, three or four of them whom the obligee may select; otherwise he must have sued either all of them jointly, or any one of them singly (*r*). A joint and several covenant is usually in this form:—"And the said A. B. and C. D. do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," &c.; or if there are more than two covenantors, the better form is, for the reason above given, "And the said A. B., C. D., E. F. and G. H. do hereby, for themselves, their heirs, executors and administrators, jointly, and any two or

(*q*) 3 Rep. 14 b; *Smarte v. Edmun*, 1 Lev. 30; 2 Wms. Saund. 51. (*r*) *Per Buller, J., in Streetfield v. Halliday*, 3 T. Rep. 782.

three of them, do hereby for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators covenant," &c. In all cases of joint and several liability, each party is individually liable, and may be sued alone for the whole debt, or if the creditor please, he may sue them all jointly. In consequence of the joint liability, a release of one of the debtors will discharge them all; and, as they are all discharged, the creditor will thenceforth be unable even to sue any of them severally(s). As, however, the several liability is distinct from the joint, it is competent to the creditor, in releasing one of the debtors, expressly to reserve his remedy against the others; and in this case, each of the remaining debtors will continue severally liable(t). So he may covenant with one of the debtors never to sue him; and in such a case he will retain his remedy against the others severally(u). On account of the several liability, the estate of a person who has become jointly and severally bound, is not discharged by his decease in the lifetime of his co-debtors, but still remains liable to the entire debt as respects the creditor, and to a proportion of it as respects the surviving co-debtors.

Release of one.

Covenant not to sue one.

One of the most usual means of incurring a joint and several liability is the entering into a partnership. At law the liability of partners is joint only as to debts incurred by the partnership; so that they ought all to be joined as defendants to an action at law for recovering any such debt(x). But a dormant partner,

Liability of partners.

Joint at law.

(s) 2 Rol. Abr. 412 (G), pl. 5; 807; *Thompson v. Lack*, 3 C. B. 540. See however *Kearsley v. Clayton v. Kynaston*, 2 Salk. 574; *Nicholson v. Revill*, 4 Adol. Cole, 16 Mee. & Wels. 136.
& Ell. 683; S. C. 6 Nev. & Man. 192.
(u) *Lacy v. Kynaston*, 2 Salk. 575; 2 Wms. Saund. 48, n. (1).

(t) *Ex parte Gifford*, 6 Ves. (x) See *Rice v. Shute*, 5 Burr.

Joint and several in equity.

whose name may or may not be known, may either be joined or not at the pleasure of the creditor (*y*), unless the contract be under seal, in which case, as the deed is itself the contract, and not merely evidence of it (*z*), those only can be sued on it who have sealed and delivered it. In equity, however, in favour of creditors, all partnership debts are considered to be both joint and several. On the decease of a partner, therefore, his estate will be liable in equity to all the partnership debts incurred previous to his decease (*a*); and the creditors may, if they please, resort in the first instance to the estate of the deceased, leaving it to his representatives to recover from the surviving partners their share of the debts (*b*). It seems, however, that in analogy to the rule in bankruptcy, next stated, the separate creditors of the deceased partner would first be paid in full out of his estate, before its application to the payment of any of the debts of the partnership (*c*).

Bankruptcy of a trading partnership.
Joint and several debts.

In the case of the bankruptcy of a trading partnership, the rule which is always followed in the payment of the debts is, that the joint assets of the firm are in the first place liable to the partnership debts; and that the separate estate of each partner is in the first place liable to his separate debts, which must be paid in full out of such separate estate, before any of it can be applied towards payment of the debts of the partnership (*d*).

2611; 1 Wms. Saund. 291 b, n. (4).

(*y*) *De Mautort v. Saunders*, 1 Barn. & Adol. 398; *Beckham v. Drake*, 9 Mee. & Wels. 79; 11 Mee. & Wels. 315.

(*z*) *Ante*, p. 75.

(*a*) *Devaynes v. Noble*, 1 Meriv. 529, 563; 2 Russ. & Ry. 495.

(*b*) *Wilkinson v. Henderson*, 1 M. & Keen, 582; *Braithwaite v.*

Britain, 1 Keen, 206; *Thorpe v. Jackson*, 2 You. & Coll. 553;

Way v. Bassett, 5 Hare, 55.

(*c*) *Gray v. Chiswell*, 9 Ves. 118; *Brown v. Weatherby*, 12 Sim. 6, 10.

(*d*) *Ex parte Elton*, 3 Ves. 238, 241; *Ex parte Kensington*, 14 Ves. 447; *Ex parte Peuke*, 2 Rose, 54; *Ex parte Harris*, 1 Mad. 583; *Ex parte Janson*, 3

Any creditor of a partnership may however be a petitioning creditor in respect of his debt, on the bankruptcy of any individual member of the firm; and in that case he will be entitled to a dividend on his debt out of the estate of such bankrupt rateably with his separate creditors (*e*). And the other partnership creditors may prove their debts on such separate bankruptcy in order to have a vote in the choice of creditors' assignees, and to be heard against the allowance of the bankrupt's certificate (*f*); but they can receive no dividends till the separate creditors have been paid in full. But if any creditor has a joint and several security, which would enable him, at law, to sue any partner severally, he may, at his option, prove his debt against the separate estate of any such partner instead of against the firm jointly (*g*); but he cannot prove against both together (*h*). The rule that the joint assets of the firm are in the first place liable to the partnership debts applies equally where there has been a change in the partnership previous to the bankruptcy. The stock handed over to the new firm is primarily liable to all the debts incurred by them; and the creditors of the old firm must first have recourse to such assets, if any, as may still belong to the old firm, and cannot touch the property of the new partnership till all its creditors have been fully paid (*i*). The addition or withdrawal of a partner to or from a firm in difficulties may thus occasion serious detriment to its creditors.

Mad. 229; *Re Plummer*, 1 Phil. 56.

(*e*) *Ex parte Ackerman*, 14 Ves. 604; *Ex parte Detastet*, 17 Ves. 247.

(*f*) Stat. 6 Geo. IV. c. 16, s. 62; 5 & 6 Vict. c. 122, s. 39. See *ante*, pp. 117, 121.

(*g*) *Ex parte Hay*, 15 Ves. 4.

(*h*) *Ex parte Bevan*, 10 Ves. 107; *Ex parte Husbands*, 2 Glyn & Jam. 4.

(*i*) *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Glyn & Jam. 96; *Ex parte Janson*, 3 Mad. 229.

Ostensible partner.

Retiring partner.

Deceased partner.

Executor carrying on trade.

The liability to the debts of a partnership may be incurred by being an ostensible partner, although no share of the profits be received. Thus if a person allow his name to be used as one of a firm (*k*), or to be painted over the door of a shop (*l*), he will be liable to the debts of the firm; for credit may thus be given to the firm on the strength of his character as a solvent person. On the same principle, if a person have once been known to be a partner in a firm (*m*), his liability to its debts will continue after his withdrawal, unless he takes proper means to inform the creditors that he has ceased to be a partner (*n*). But the circumstance of the name of a deceased partner remaining in the firm will not render his estate liable to the debts of the survivors (*o*). And if a trader direct by his will that his trade shall be carried on by his executor, the executor, who ostensibly carries on the trade, will be liable for the debts he may thereby incur as fully as if he were carrying on the trade for his own benefit (*p*); but so much only of the estate of the testator will be liable to such debts as he may have directed to be employed in the business (*q*). The rest of the testator's estate is held to be exempt, on the ground of the great inconvenience which would arise from holding it liable after its distribution amongst the legatees. But in strict principle, this exemption is at

(*k*) *Parkin v. Carruthers*, 3 Esp. 248; *Young v. Axtell*, cited 2 H. Black. 242.

(*l*) See *M'Iver v. Humble*, 16 East, 169, 174.

(*m*) *Evans v. Drummond*, 4 Esp. 89; *Brooke v. Enderby*, 2 Brod. & Bing. 70; 4 Moore, 501; *Carter v. Whalley*, 1 Barn. & Adol. 11.

(*n*) *Godfrey v. Turnbull*, 1 Esp. 371; *M'Iver v. Humble*, 16 East, 169.

(*o*) *Vulliamy v. Noble*, 3 Mer. 614; *Webster v. Webster*, 3 Swanst. 490, n.

(*p*) 10 Ves. 119. And at law he will be liable, though his name do not appear; *Wightman v. Townroe*, 1 Mau. & Selw. 412.

(*q*) *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, Buck, 202; *Cutbush v. Cutbush*, 1 Beav. 184; *Re Butterfield*, 11 Jurist, 955.

variance with the rule next stated, that a liability is incurred by any participation in the profits.

A liability to the debts of a partnership is also incurred by a participation in the profits, although the circumstance of such a participation may be unknown to the creditors (*r*). Thus if a person place money in a partnership(s), or leave it there on retiring (*l*), with a stipulation to have a compensation for it, under whatever name, subject to abatement or enlargement as the profits may fluctuate, he will be liable as a partner. If, however, he leaves no money in the concern, but is to receive a compensation for his services or otherwise, a nice distinction is then drawn between taking a share of the profits as such, and taking a per centage upon, or a salary varying with, the profits. He who takes a share of the profits as such is liable as a partner (*u*); but he who takes an equivalent in the shape of per centage or salary, though varying with the profits, escapes the liability (*x*).

Participation in profits.

When the relation of partners has been established between two or more persons, either ostensibly or by participation in profits, each incurs liability from the acts and dealings of the other in the ordinary course of business. For any one partner may buy, sell (*y*), or pledge goods (*z*); draw (*a*), accept (*b*), or indorse (*c*) bills

Each partner liable to acts of the other in the ordinary course of business.

(*r*) *Beckham v. Drake*, 9 Mee. & Wels. 79; 11 Me. & Wels. 315.

Lambert's case, Godbolt, 244.

(*s*) *Grace v. Smith*, 2 Wm. Black. 998, 1001.

(*z*) *Reid v. Hollinshead*, 4 B. & Cress. 867.

(*t*) *Re Colbeck*, Buck, 48.

(*a*) *Smith v. Jarvis*, 2 Lord Raymond, 1484; *Re Clarke, Ex parte Buckley*, 14 Mee. & Wels. 469; 1 Phil. 562.

(*u*) *Ex parte Rowlandson*, 1 Rose, 89, 91; *Barry v. Nesham*, 3 C. B. 641; see, however, *Rawlinson v. Clarke*, 15 Mee. & Wels. 292.

(*b*) *Pinkney v. Hall*, 1 Salk. 126; 1 Lord Raym. 175; *Lloyd v. Ashby*, 2 B. & Adol. 23.

(*x*) *Ex parte Hamper*, 17 Ves. 403; *Pott v. Eytton*, 3 C. B. 32.

(*c*) *Swan v. Steele*, 7 East, 210; *Vere v. Ashby*, 10 Barn. & Cress. 288.

(*y*) *Hyat v. Hare*, Comb. 383;

Notice to one partner is notice to all.

Transactions not in the ordinary course of business.

of exchange and promissory notes; give guarantees (*d*), receive moneys (*e*), and release or compound for debts (*f*) in the name (*g*) and on account of the firm, in the ordinary course of business. Each partner is also answerable for the fraud of his copartner in any matter relating to the business of the partnership (*h*). And in like manner notice of any matter relating to the partnership, if given to one partner, is constructively notice to them all (*i*). And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor (*k*) who may not have notice of it (*l*). If, however, the transaction be not in the ordinary course of the business of the partnership, the other partners will not be liable as such in respect of it. Thus one partner cannot bind the firm by a submission to arbitration (*m*); and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the partnership (*n*). So a farmer carrying on his business in partnership with another would not be liable on a bill of exchange drawn by his partner in the name of the partnership (*o*); neither would a solicitor be liable on

(*d*) *Ex parte Gardom*, 15 Ves. 286; see *Hasleham v. Young*, 5 Q. B. 833.

(*e*) *Duff v. East India Company*, 15 Ves. 198, 213.

(*f*) *Per* Lord Kenyon, 4 T. Rep. 519; *per* Best, C. J., 10 Moore, 393.

(*g*) *Kirk v. Blurton*, 9 Mee. & Wels. 284.

(*h*) *Willet v. Chambers*, Cowp. 814; *Stone v. Marsh*, 6 Barn. & Cress. 551; *Lovell v. Hicks*, 2 You. & Coll. 481; *Blair v. Bromley*, 5 Hare, 542.

(*i*) *Per* Lord Ellenborough, 1

Mau. & Selw. 259.

(*k*) *Wagh v. Carver*, 2 H. Black. 235; *South Carolina Bank v. Case*, 8 Barn. & Cress. 427; *Hawken v. Bourne*, 8 Mee. & Wels. 703, 710.

(*l*) *Minnit v. Whinery*, 5 Bro. Parl. Cas. 489.

(*m*) *Stead v. Salt*, 3 Bing. 101; S. C. 10 J. B. Moore, 389.

(*n*) *Harrison v. Jackson*, 7 T. Rep. 207; see *Burn v. Burn*, 3 Ves. 573, 578.

(*o*) *Per* Littledale, J., 10 Barn. & Cress. 138.

a bill drawn by his partner in the name of his firm, though given to secure a partnership debt (*p*); for bill transactions form no part of the ordinary business of either farmers or solicitors. Again there is no right or power implied by law in any of the directors of a joint stock company to bind the company by drawing or accepting bills or notes (*q*); and in like manner notice of any matter relating to the business of a joint stock company given to any member, even a director, is not constructive notice to the company itself (*r*). For joint stock companies are essentially different from ordinary partnerships. It is not necessary that the directors should have any other power to bind the company by bills or notes than such as may be conferred on them by the charter or deed of settlement (*s*); and the business of such companies is always carried on at an office for the purpose, and is not, like that of ordinary partnerships, confided to any one individual member.

Directors of joint stock companies.

The liability of a shareholder in a joint stock company to the debts of the company has been already noticed. It varies, as we have seen, according as the company is incorporated under a special act (*t*), or under the general act for the incorporation of joint stock companies (*u*), or under the act for the regulation of joint stock banks (*x*). The mere circumstance, however, of a person allowing his name to be published as a provisional committee-man of a projected joint stock company (*y*) does not confer on the solicitor or secretary of the intended com-

Shareholders in joint stock companies.

Provisional committee-man.

(*p*) *Hedley v. Bainbridge*, 3 Q. B. 316. s. 45; c. 113, s. 22.

(*q*) *Dickinson v. Valpy*, 10 B. & Cress. 128; *Bramah v. Roberts*, 3 N. C. 963. (*t*) See stat. 8 & 9 Vict. c. 16, s. 36; *ante*, p. 160.

(*r*) *Powles v. Page*, 3 C. B. 16; *Martin v. Sedgwick*, 9 Beav. 333. (*u*) Stat. 7 & 8 Vict. c. 110, ss. 66—68; *ante*, p. 165.

(*s*) See stat. 7 & 8 Vict. c. 110, s. 45; c. 113, s. 22. (*x*) Stat. 7 & 8 Vict. c. 113, ss. 7—10; *ante*, p. 167.

(*y*) See *ante*, p. 163.

(*s*) See stat. 7 & 8 Vict. c. 110,

pany, or on any one else, implied authority to pledge the credit of such person for goods supplied to the company, or work done on its account (*z*). For to agree to become a member of a committee is merely to agree to become one of a body, to whom others have committed a particular duty, and does not constitute an agreement to share with the other members of that body in profit or loss, which is the characteristic of a partnership (*a*).

Powers of assignees in bankruptcy to bind the creditors.

113 Vic c 106 s 153

Assignees of insolvents.

Assignees in bankruptcy have no authority to compound any debt due to the bankrupt's estate, or to give time or take security for the payment of any such debt, or to submit disputes to arbitration, or to commence any suit in equity, without the consent of the major part in value of the creditors who shall have proved, present at a meeting duly convened for each particular case; but if one-third in value or upwards of such creditors shall not attend the meeting, the consent of the commissioner under his hand will be sufficient (*b*). And any agreement of reference to arbitration made by the assignees may be made a rule of the Court of Bankruptcy (*c*). The assignees of insolvents cannot bind the creditors by any of the above acts, without the consent in writing of the major part in value of the creditors present at a meeting duly convened, nor without the approbation of the court or one of the commissioners (*d*). But as the consent of the creditors is required only for their protection, the want of such consent is no defence to any suit instituted by the assignees of any bankrupt or insolvent (*e*).

(*z*) *Reynell v. Lewis*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 946.

(*a*) 15 Mee. & Wels. 529.

(*b*) Stat. 6 Geo. IV. c. 16, s. 88; *Ex parte Whitchurch*, 1 Atk. 91.

(*c*) Stat. 1 & 2 Will. IV. c. 56, s. 43; see *ante*, p. 139.

(*d*) Stat. 1 & 2 Vict. c. 110, s. 51; 7 & 8 Vict. c. 96, s. 13.

(*e*) *Piercy v. Roberts*, 1 My. & Keen, 4; *Casborne v. Barsham*, 6 Sim. 317.

CHAPTER III.

OF A WILL.

ALL kinds of personal property may be bequeathed by will. This right, in its present extent, has been of very gradual and almost imperceptible growth; for anciently, by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children and no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children (*a*). This ancient rule, however, gradually became subject to many exceptions, by the customs of particular places, until the rule itself took the place of an exception and became confined to such places as had a custom in its favour. These places, in later times, were the province of York, the principality of Wales, and the city of London; as to all which places, a general power of testamentary disposition was conferred by acts of parliament of William and Mary, Anne, and George I. (*b*); and now, by the recent act for the amendment of the laws with respect to wills (*c*), every person of full age is expressly empowered to bequeath by his will, to be executed as required by the act, all personal estate to which he

Growth of right
of testamentary
alienation.

(*a*) 2 Black. Com. 492; Williams on Executors, pt. 1, bk. 1, ch. 1; see also 1 C. P. Cooper's Reports, p. 539.

(*b*) Stat. 4 & 5 Will. & Mary, c. 2, explained by stat. 2 & 3 Anne, c. 5, for the province of

York; stat. 7 & 8 Will. III. c. 38, for Wales; and stat. 11 Geo. I. c. 18, for London. See 2 Bl. Com. 493.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3.

shall be entitled, either at law or in equity, at the time of his decease.

The ecclesiastical courts, as we shall hereafter see, very early acquired the right of determining as to the validity of wills of personal estate; and, in the exercise of this right, they generally followed the rules of the civil law. By this law, males at the age of fourteen, and females at the age of twelve, were allowed, if of sufficient discretion, to make a testament (*d*); and the same rule, accordingly, prevailed in this country with respect to wills of personal property (*e*), although, by some authorities, seventeen and even eighteen was said to be the proper age (*f*). The act for the amendment of the laws with respect to wills, has, however, now made the law uniform with respect to all wills, whether of real or of personal estate, and has enacted that no will made by any person under the age of twenty-one years shall be valid (*g*).

Age at which
a will of per-
sonal estate
might be made.

No will of a
minor now
valid.

Nuncupative
will.

Statute of
Frauds.

Personal property was anciently of so little account that a will of it might be made by word of mouth, if proved by a sufficient number of witnesses, as well as by writing; and a will made by word of mouth was termed a nuncupative testament (*h*). By the Statute of Frauds, however, a nuncupative testament, where the estate bequeathed exceeded the value of thirty pounds, was surrounded by so many requirements as to cause its complete disuse (*i*). But no provision was made for guarding the execution of a written will of personal

(*d*) Inst. lib. 2, tit. 12, s. 1;
Dig. lib. 28, tit. 1, s. 5.

(*e*) 2 Bl. Com. 497.

(*f*) Co. Litt. 89 b, n. (6).

(*g*) Stat. 7 Will. IV. & 1 Vict.
c. 26, s. 7.

(*h*) Wentworth's Executors, 11
et seq.; Williams on Executors,
pt. 1, bk. 2, ch. 2, s. 6.

(*i*) Stat. 29 Car. II. c. 3, ss.
19—21, explained by stat. 4
Anne, c. 16, s. 14.

estate; although by the same statute (*k*) a will of real estate was required to be attested by three or four witnesses. No attestation, therefore, was required to a will of personal estate, nor was it even necessary that such a will should be signed by the testator. Thus, instructions for a will, committed to writing, given by a person who died before the instrument could be formally executed, though such instructions were neither reduced into writing in the presence of the testator, nor even read over to him, have been held to operate as fully as a will itself (*l*). It was, however, provided by the Statute of Frauds, that no will in writing of personal estate should be repealed or altered by word of mouth only, except the same were, in the life of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least (*m*).

No witness formerly required to a will of personal estate.

By the recent act for the amendment of the laws with respect to wills, every will of personal estate must now be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator (*n*). The act, in fact, requires the same mode of execution and attestation to every will, whether the property be real or personal. But an exception is made in favour of soldiers being in actual military service, that is, on an expedition (*o*), and of

New enactment, two witnesses now required.

Exception in favour of soldiers and seamen.

(*k*) Sect. 5.

c. 26, s. 9. See Principles of the Law of Real Property, 151.

(*l*) *Carey v. Askew*, 2 Bro. C. C. 58; S. C. 1 Cox, 241.

(*o*) *Drummond v. Parish*, 3

(*m*) Stat. 29 Car. II. c. 3, s. 22.

Curt. 522.

(*n*) Stat. 7 Will. IV. & 1 Vict.

Seamen in the
royal navy, and
marines.

Revocation of
a will.

mariners and seamen, including merchant seamen (*p*), being at sea, who may dispose of their personal estate as they might have done before the making of the act (*q*): a similar exception was contained in the Statute of Frauds (*r*). The wills of soldiers on an expedition, and of merchant seamen, may accordingly be made by an unattested writing, or by a mere nuncupative testament, or declaration of their will by word of mouth, made before a sufficient number of witnesses. But the wills of petty officers and seamen in the royal navy, and of marines and noncommissioned officers of marines, so far as relates to any wages, pay, prize money or other monies payable in respect of services in Her Majesty's navy, are required by act of parliament (*s*) to be executed in the presence of and to be attested by the captain of the ship, or certain other officers or persons mentioned in the act; and the wills of such persons are also guarded by other requisitions in order to prevent their being imposed upon. By the act to amend the laws with respect to wills it is also provided that no will or codicil, or any part thereof, shall be revoked otherwise than by the marriage of the testator or testatrix (which will of itself effect a revocation (*t*)), or by another will or codicil executed in the manner thereby required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereby required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*u*).

(*p*) *Morrell v. Morrell*, 1 Hag. 51.

(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 11.

(*r*) Stat. 29 Car. II. c. 3, s. 23.

(*s*) Stat. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 48—51; 7 Will. IV.

& 1 Vict. c. 26, s. 12; Williams on Executors, pt. 1, bk. 4, c. 4.

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18. See Principles of the Law of Real Property, 153.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20.

Connected with the subject of wills is that of donations mortis causâ, which may here be noticed. A donation mortis causâ is a gift made in contemplation of death, to be absolute only in case of the death of the giver (*w*). Being a gift, it can be made only of chattels, the property in which passes by delivery (*x*); although a bond debt has, contrary to this principle (*y*), been allowed to pass by way of donation mortis causâ by delivery of the bond (*z*). An actual or constructive delivery of the subject of gift to the donee is essential to a donation mortis causâ (*a*); it must also be made in expectation of the donor's decease (*b*), and must be on condition that the gift be absolute only on that event (*c*). It is no objection, however, that the donation is clogged with a trust to be performed by the donee (*d*). A donation mortis causâ is revocable by the donor during his life (*e*), and after his decease it is subject to his debts (*f*), and also to legacy duty (*g*).

Donatio mortis causâ.

The mode of operation of a will of personalty is essentially different from the operation of a will of lands in this respect, that in strictness the appointment of an executor was formerly essential to a will of personalty (*h*); and, at the present day, the usual and proper

Appointment of executor formerly essential.

(*w*) Inst. tit. 7, De Donationibus, cited by Lord Loughborough, in *Tate v. Hilbert*, 2 Ves. jun. 119; *Walter v. Hodge*, 2 Swanst. 99.

(*x*) See *ante*, p. 32; *Miller v. Miller*, 3 P. Wms. 356.

(*y*) *Duffield v. Elwes*, 1 Sim. & Stu. 244.

(*z*) *Snellgrove v. Baily*, 3 Atk. 214.

(*a*) *Wood v. Turner*, 2 Ves. sen. 431; *Bryson v. Brownrigg*, 9 Ves. 1; *Bunn v. Markham*, 7 Taunt. 224; *Ruddell v. Dobrec*, 10 Sim. 244; *Farquharson v.*

Cave, 2 Coll. 356.

(*b*) *Tate v. Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286.

(*c*) *Edwards v. Jones*, 1 My. & Craig, 226.

(*d*) *Blount v. Burrow*, 4 Bro. C. C. 72; *Hills v. Hills*, 8 Mee. & Wels. 401.

(*e*) 7 Taunt. 232.

(*f*) 1 P. Wms. 406; 2 Ves. sen. 434.

(*g*) Stat. 36 Geo. III. c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

(*h*) *Wentworth's Executors*, 3, 4, 14th edit.; 2 Bla. Com. 503.

method is to appoint an executor as to the personal estate; whereas, under a devise of landed property, the lands pass at once to the devisee, and the intervention of an executor is quite unnecessary and inapplicable. The executor of a will of personal estate becomes entitled, from the moment of the death of the testator, to all his personal property (*i*), which after payment of the debts of the deceased he is bound to apply according to the directions of the will. Thus if the testator should specifically bequeath any part of his personal property, the property so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest; and this assent must not be given until the executor is satisfied that there is sufficient to pay the debts of the deceased without having recourse to the property so specifically given (*k*).

Executor entitled to all personal property of testator.

Executor's assent.

If the testator should appoint as his sole executor an infant under the age of twenty-one years, such infant will not be allowed to exercise his office during his minority; but during this time the administration of the goods of the deceased will be granted to the guardian of the infant, or to such other person as the spiritual court may think fit (*l*). Such person is called an administrator *durante minore ætate* (*m*). If a married woman should be appointed an executrix, she cannot accept the office without the consent of her husband (*n*), and having accepted it with his consent, she is unable, without his concurrence, to perform any act of administration which may be to his prejudice; whilst he, on the other hand, may release debts due to the deceased, or make assign-

Administrator *durante minore ætate*.

Married woman executrix.

(*i*) Co. Litt. 388 a; Com. Dig. tit. Biens (C); Williams on Executors, pt. 2, bk. 2.

(*k*) Toller's Executors, book 3, s. 2; Williams on Executors, pt. 3, bk. 3, ch. 4, s. 3.

(*l*) Stat. 38 Geo. III. c. 87, s. 6.

(*m*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.

(*n*) *Ibid.* pt. 1, bk. 3, ch. 1.

ment of the deceased's personal estate without his wife's concurrence (*o*); for as the general rule of law is that a husband and wife are but one person, the power, and with it the responsibility, are vested in the husband. Nevertheless a married woman, being an executrix, may make a will without the consent of her husband, confined to the personal estate of which she is executrix (*p*); and the executor of her will so made, will be the executor of the original testator. For it is a general rule, that if any executor should die before having completely administered the estate of his testator, the executor appointed by the will of such executor will be entitled to complete the distribution of the estate of the former testator (*q*).

Executor of executor entitled to be executor of testator.

The testator however may, and usually does, appoint more than one person his executors. In this case the law regards all the co-executors as one individual person; and consequently any one of the executors of full age may, during the life of his companions, perform, without their concurrence, all the ordinary acts of administration, such as giving receipts, making payments and selling and assigning the property (*r*). But all the executors, infants included, must join in bringing actions respecting the estate (*s*). If, therefore, the testator appoint a person indebted to him as his executor, or one of his executors, this appointment will operate at law as a release of the debt (*t*). For the debt is a chose in action, and a man cannot either solely or conjointly with others bring an action against himself. In equity,

Any one of the executors may perform acts of administration.

All must join in bringing actions.
Appointment of debtor executor.

(*o*) Williams on Executors, pt. 3, bk. 1, ch. 4; 5 Rep. 27 b.

may demise the entirety of the testator's leasehold land. *Doe d.*

(*p*) *Ibid.* pt. 1, bk. 2, c. 1, s. 2.

Stace v. Wheeler, 15 Me. & Wels. 623.

(*q*) 2 Bla. Com. 506.

(*r*) Shep. Touch. 484.

(*t*) Wentworth's Executors, 73,

(*s*) Williams on Executors, pt. 3, bk. 1, c. 2. An ejectment is an exception, as any one executor

14th edit.; *Freakley v. Fox*, 9 B. & Cress. 130.

Survivorship of
office of exe-
cutor.

Renunciation
by one in life-
time of others.

Executor *de son*
tort.

however, an executor who was indebted to the testator is bound to account for his debt to the estate of the testator (*u*). On the decease of any co-executor, the office survives to those who remain; and this survivorship operates to such an extent, that if one of them should renounce the executorship in the lifetime of his companions, he may at any time change his mind and undertake the office; but if, having survived all his companions, he should then renounce, he cannot afterwards interfere (*v*). When there are two or more executors, the executor of the will of the survivor of them will, after the decease of all of them, be entitled to act as executor of their testator (*x*).

If any person not duly authorized should intermeddle with the goods of the testator, or do any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called in law French, an executor *de son tort*. Such an executor is liable to the same demands from the creditors of the deceased as if he had been regularly appointed; but like a regular executor he is not liable beyond the amount of the assets of the testator which have come to his hands. The chief difference between such an executor and one who has been duly appointed is this: that an executor *de son tort* is not allowed to derive any benefit from his own wrongful intermeddling; whereas a regularly appointed executor, if a creditor of the deceased, may lawfully retain his own debt out of the assets in preference to all other debts of the same degree (*y*). ✕

The most striking difference between a will of personal estate and a will of lands, yet remains to be no-

(*u*) Bac. Ab. tit. Executors and Administrators (A) 10; *Simmons Gutteridge*, 13 Ves. 264.

(*v*) *Heusloe's case*, 9 Rep. 36; *Creswick v. Woodhead*, 4 Man. & Gran. 811.

(*x*) *Williams on Executors*, pt. 1, bk. 3, ch. 4.

(*y*) *Ibid.* pt. 1, bk. 3, ch. 5; pt. 3, bk. 2, ch. 2, s. 6.

ticed. A will of lands has always operated and still operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title.

But a will of personal estate requires to be proved in some ecclesiastical court. In this court the will itself is deposited, and a copy of the will, which is given by the court to the executor on proving, denominated the probate copy, is the only proper evidence of the right of the executor to intermeddle with the personal estate of his testator (z). Before probate, however, the executor may perform all the ordinary acts of administration, such as receiving and giving receipts for debts due to the testator, paying the debts owing by the testator, and selling and assigning any part of the personal estate. But when evidence is required of his right to intermeddle, the probate is the only valid proof; without it, therefore, no action or suit can be maintained, although proceedings may be commenced before, and carried up to the point where the evidence is required (a).

A will of personalty must be proved.

The probate the only proper evidence.

Acts of executor before probate.

The jurisdiction of the ecclesiastical courts over wills of personal estate is of very ancient origin. The probate of wills of personalty, as a means of their authentication, appears to have been in use from the very earliest times. The first persons by whom probate was granted were said to be the lords of manors; and some vestiges of this ancient right seem yet to remain in the case of one or two manors, the lords of which still retain such a jurisdiction (b). But so early as the time of Glanville, who wrote in the reign of Henry II., the ecclesiastical courts had acquired an exclusive right to determine on the validity of a will or the bequest of a legacy (c). And, from this period, the right of the

Ecclesiastical jurisdiction over wills.

perfect not required now, by 15 & 16 V. c 76 -

(z) *Rex v. Netherscal*, 4 T. R. 260; Wms. Ex. pt. 1, bk. 4, ch. 1.

(a) *Williams on Executors*, pt. 1, bk. 4, ch. 1, s. 2.

(b) *Wentworth's Ex.* 14th edit. 99, 100; *Toller's Executors*, 50.

(c) *Glanville*, lib. 7, c. 6, 7; 1 *Reeve's Hist. Eng. Law*, 72.

church to interfere in testamentary matters became gradually settled, though not without much opposition on the part of the temporal lords.

In what court
probate should
be taken out.

Bona notabilia.

A will must be proved in the court of the bishop or ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lie. But if there be effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, the will ought to be proved in the Prerogative Court of the archbishop of that province(*d*). If there be personal effects within two provinces, the will must be proved in each province, either in the Prerogative Court, or in some court of inferior jurisdiction; observing, as to each province, the same rule as would have applied had the testator had no property elsewhere(*e*). If probate be granted by a bishop, or other inferior judge, in a case where the deceased had goods to the value of 5*l.* in any other diocese in the same province, such probate will be absolutely void; but probate granted by an archbishop, in a case where the deceased had not *bona notabilia* in divers dioceses, will be voidable only, and not absolutely void(*f*).

Evidence re-
quired on pro-
bate.

The evidence required by the ecclesiastical court for the proof of a will varies according to the form of the attestation, and also according to the circumstance of

(*d*) Williams on Executors, part 1, book 4, chap. 2. For an account of the rise of the archbishop's jurisdiction, see Gent. Mag. new series, vol. 12, p. 582.

(*e*) Second Report of Real Property Commissioners, 67.

(*f*) Wentworth's Executors, 110, 14th edit.; *Lysons v. Barrow*, 2 Bing. N. C. 486. By

stat. 10 & 11 Vict. c. 98, ss. 3, 4, the jurisdiction of the ecclesiastical courts in England in testamentary matters, and the law of *bona notabilia*, continue unaltered by the recent changes of provinces, dioceses, archdeaconries, and other jurisdictions effected under the provisions of stat. 6 & 7 Will. IV. c. 77.

the validity of the will being or not being disputed. The usual and proper form of attestation to a will expresses that the formalities required by the Wills Act(*g*) have been complied with; thus, "Signed and declared by the above named A. B., the testator, as and for his last will and testament, in the presence of us, both present at the same time, who, at his request, in his presence, and in the presence of each other, have hereto subscribed our names as witnesses." When the attestation is in this form, and the validity of the will is not disputed, it is *proved* by the simple oath of the executor, that he believes the will to be the true last will and testament of the deceased. But as such a form of the attestation clause is not essential to the validity of the will(*h*), wills are sometimes informally made without any clause of attestation, or with a clause which does not express that the required formalities have been complied with. When this occurs, an affidavit, in addition to the executor's oath, is required from one of the subscribing witnesses, that the will was executed in compliance with the statute(*i*). Probate in either of the above modes is termed probate *in common form*. Probate in common form; But if the validity of the will should be disputed, or any dispute should be anticipated by the executor, the will is proved *in solemn form per testes*. In this case in solemn form, both the witnesses are sworn and examined, and such other evidence taken as the circumstances require, in the presence of the widow and next of kin of the testator, and all others pretending to have any interest, who are cited to be present to see the proceedings. When a will has once been proved in this form it is finally established, and the executor cannot be compelled to prove it any more; but when a will has been

(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, *ante*, p. 235. (*i*) Williams on Executors, part 1, book 4, chap. 3, sect. 3.

(*h*) Sect. 9.

proved merely in common form, the executor may, at any time within thirty years, be compelled by any party interested to prove it *per testes* in solemn form (*k*).

Stamp duties on probates.

Probates of wills are required by act of parliament to be stamped with an *ad valorem* duty, according as the value of the personal estate of the testator, within the jurisdiction of the spiritual judge granting probate (*l*), may exceed twenty pounds, the lowest amount of the scale, or amount to one million, the highest (*m*). But probates of wills operating merely in exercise of powers of appointment over property of which the deceased had no ownership, are not subject to duty in respect of the value of the property appointed (*n*). Ex-

Emptions.

emptions from probate duty have also been made by parliament in favour of the effects of common seamen, marines and soldiers, who may be slain or die in the queen's service (*o*), and in favour of depositors in savings banks whose whole estate and effects shall not exceed fifty pounds sterling (*p*). And pay, wages, prize money or pensions due to deceased naval officers, marines, seamen, and others employed in the navy, whose whole assets shall not exceed thirty-two pounds, are allowed

Seamen's wills.

to be paid out without probate of their wills (*q*). Probates of the wills of petty officers and seamen in the royal navy, and of marines and non-commissioned officers of marines, are placed by act of parliament under the care of an officer called the inspector of seamen's wills, and are subject to special regulations made to

(*k*) Williams on Executors, part 1, book 4, chap. 3, sect. 4.

(*l*) *Attorney General v. Hope*, 1 Cro. Mee. & Rosc. 530; 4 Tyr. 878; 8 Bligh, 41; 2 Cl. & Fin. 81; *Attorney General v. Bournes*, 4 Mee. & Wels. 171; Williams on Executors, pt. 1, bk. 7.

(*m*) Stat. 55 Geo. III. c. 184.

(*n*) *Platt v. Routh*, 6 Mee. & Wels. 756; 3 Beav. 257; affirmed in the House of Lords.

(*o*) Stat. 55 Geo. III. c. 184.

(*p*) Stat. 9 Geo. IV. c. 92, ss. 40—42.

(*q*) Stat. 4 & 5 Will. IV. c. 25, s. 8.

prevent frauds on persons proverbially careless, and liable to imposition (*r*).

When the will has been proved, it is the duty of the executor to pay the testator's debts out of the personal estate, to which such executor becomes entitled by virtue of his office. For this purpose the executor has reposed in him by the law the fullest powers of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will (*s*). And in the event of a sale of any such property by the executor, the purchaser is not bound to inquire whether there are any debts remaining unpaid; for in the absence of evidence to the contrary, the executor is presumed to be acting in the proper discharge of his office (*t*). Nor is the purchaser at all concerned with the application which the executor may make of the purchase money; but the executor's receipt will be a sufficient discharge, and he alone will be responsible to the creditors and legatees for its due application (*u*). The order in which debts ought to be paid out of the personal estate of a deceased debtor has been already noticed in the chapter on debts (*x*); and it has also been stated that the executor, if a creditor, is entitled to retain his own debt in preference to all others of the same degree (*y*).

Payment of debts.

Powers of executors.

Purchaser from executor not bound to inquire if there be debts.

Nor to see to the application of his purchase money.

When the debts have been paid, the legacies left by the testator are then to be discharged. In order to give

Legacies.

Executor's year.

(*r*) Stat. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 55—58, amended by stat. 2 & 3 Will. IV. c. 40, ss. 12, 13; 4 & 5 Will. IV. c. 25, s. 8; Williams on Executors, pt. 1, bk. 4, c. 4; bk. 5, chap. 2, s. 4.

(*s*) *Ewer v. Corbet*, 2 P. Wms. 148.

(*t*) *Nugent v. Gifford*, 1 Atk. 463; *Elliot v. Merriman*, 2 Atk. 42.

(*u*) *Wheale v. Booth*, 4 T. Rep. 625, n.; *M'Leod v. Drummond*, 17 Ves. 151.

(*x*) *Ante*, pp. 84, 89, 91, 95.

(*y*) *Ante*, p. 210.

Liability of
executor.

Not liable be-
yond amount
of assets.

Legacy duty.

the executor sufficient time to inform himself of the state of the assets and to pay the debts of the deceased, he is allowed a twelvemonth from the date of the death of the testator before he is bound to pay any legacies(*z*). From this time, all such general legacies as remain unpaid carry interest, at the rate of four per cent. per annum(*a*). Notwithstanding the lapse of a year from the testator's death, the executor, however, is still liable to any creditor of the deceased to the amount of the assets which have come to the executor's hands(*b*); and if he should have paid any legacies in ignorance of the claims of the creditor, his only remedy is to apply to the legatees to refund their legacies, which they will be bound to do, in order to satisfy the debt(*c*). From this liability to creditors, an executor cannot be discharged, unless he throw the property into chancery, in which case the court undertakes the administration, and the executor is consequently exonerated from all risk(*d*). The executor, however, is of course not answerable to the testator's creditors beyond the amount of assets which have come to his hands(*e*), unless he should for sufficient consideration give a written promise to pay personally(*f*), or should do any act amounting to an admission that he has assets of the testator sufficient for the payment of the debts(*g*).

On the payment or delivery of any legacy of the amount or value of 20*l.* or upwards, whether payable out

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| (<i>z</i>) <i>Ward v. Penoyre</i> , 13 Ves. | Cr. 31. |
| 333; <i>Benson v. Maude</i> , 6 Madd. | (<i>d</i>) 3 My. & Cr. 126. |
| 15. | (<i>e</i>) Bac. Abr. tit. Executors |
| (<i>a</i>) <i>Ward v. Penoyre</i> , ubi su-
pra. | (P), 1. |
| (<i>b</i>) <i>Norman v. Baldry</i> , 6 Sim. | (<i>f</i>) Stat. 29 Car. II. c. 3, s. |
| 621; <i>Knatchbull v. Fearnhead</i> , 3 | 4; ante, p. 66; 1 Wms. Saund. |
| My. & Cr. 122; <i>Hill v. Gomme</i> , | 210, n. (1); 211, n. (2). |
| 1 Beav. 510. | (<i>g</i>) <i>Horsley v. Chaloner</i> , 2 Ves. |
| (<i>c</i>) <i>March v. Russell</i> , 3 My. & | sen. 83. |

of the estate of the testator, real or personal, or out of any real or personal estate over which he had a power of appointment (*h*), a receipt must be given by the legatee, which is chargeable with a duty, called the legacy duty, on the amount or value of the legacy (*i*). But no sum of money, which by any marriage settlement is subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, is liable to legacy duty under the will in which such sum is appointed or apportioned in exercise of such limited power (*k*). The amount of legacy duty varies according to the degree of relationship which the legatee bore to the deceased. Where the legacy is to a child or lineal descendant, or to the father or mother or any lineal ancestor of the deceased, the duty is one per cent. If to a brother or sister, or any descendant of a brother or sister, the duty is three per cent. If to a brother or sister of the father or mother of the deceased, or any descendant of such brother or sister, five per cent. If to a brother or sister of a grandfather or grandmother of the deceased, or any descendant of such brother or sister, six per cent. And if the legacy be to any person in any other degree of collateral consanguinity to the deceased, or to any stranger in blood, the duty is ten per cent (*l*). But the husband or wife of the deceased are exempt from all legacy duty, and so also are the royal family.

Exemption.

Amount of duty.

If a legacy be given to an infant, or to a person absent beyond the seas, the only way in which the executor can obtain a proper discharge for such legacy is by

Legacy to infant or person beyond seas.

(*h*) Stat. 8 & 9 Vict. c. 76, s. 4. (*k*) Stat. 8 & 9 Vict. c. 76, s. 4.

(*i*) Stat. 36 Geo. III. c. 52, s. 27. (*l*) Stat. 55 Geo. III. c. 184.

Legacy duty on annuities. payment of it, after deducting the legacy duty, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person for whose benefit the same shall be so paid. The money is then laid out by the accountant-general in the purchase of consols, which, with the dividends thereon, are afterwards transferred and paid to the person entitled, or otherwise applied for his benefit, on application to the Court of Chancery by petition or motion in a summary way (*m*). The legacy duty on annuities for lives is fixed by tables given in the act, and is payable by four equal payments, to be made successively on completing each of the first four years' payments of the annuity (*n*). *1852*

Specific legacy. A legacy may be either specific, demonstrative, or general. A specific legacy is a bequest of a specific part of the testator's personal estate. Thus a bequest of "the service of plate, which was presented to me on such an occasion," is specific, and so also is a bequest of "100*l.* consols, now standing in my name at the Bank of England (*o*)," or of "100*l.* consols, part of my stock (*p*)." A specific legacy must be paid or retained by the executor in preference to those which are general, and must not be sold for the payment of debts until the general assets of the testator are exhausted (*q*). It is, however, liable to *ademption* by the act of the testator in his lifetime. Thus, in the instances given above, if the testator should part with the plate, or sell the stock in his lifetime, the legacy will be adeemed, and the

Entitled to preference.

Ademption.

(*m*) Stat. 36 Geo. III. c. 52, s. 32. 97; *Shuttleworth v. Greaves*, 4 My. & Cr. 35.

(*n*) 36 Geo. III. c. 52, s. 8. (*q*) *Brown v. Allen*, 1 Vern.

(*o*) Roper on Legacies, c. 3. 31; *Hinton v. Pinke*, 1 P.Wms.

(*p*) *Kirby v. Potter*, 4 Ves. 539; *Sleech v. Thorington*, 2 Ves. 750 a; *Hayes v. Hayes*, 1 Keen, sen. 560.

legatee will lose all benefit (*r*). A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus, "I bequeath to A. B. the sum of 50*l.* sterling, to be paid out of the sum of 100*l.* consols, now standing in my name at the Bank of England," is a demonstrative legacy. Such a legacy is not liable to ademption by the act of the testator in his lifetime; for it is considered to be the testator's intention that the legatee should at all events have the legacy; but that it should, if possible, be paid out of the fund he has pointed out. If therefore the testator in this case should sell the 100*l.* consols in his lifetime, the 50*l.* will still be payable to the legatee out of the general assets (*s*). A demonstrative legacy is accordingly more beneficial to the legatee than a specific legacy. And it is also more beneficial than a legacy which is merely general; for being payable out of a specific fund, it is not, while that fund exists, liable to abatement with the general legacies (*t*). A general legacy is one payable only out of the general assets of the testator, and is liable to abatement in case of a deficiency of such assets to pay the testator's debts and other legacies. A bequest to A. of 100*l.* sterling is a general legacy; so is a bequest of 100*l.* consols, without referring to any particular stock to which the testator may be entitled (*u*). A bequest of a mourning ring, of the value of 10*l.*, is also a general legacy, no specific ring of the testator's being referred to (*x*). In the two last cases, the executor would be bound to set apart or buy the stock, or purchase the ring for the legatee out of the general assets of the testator, supposing them sufficient for the pur-

Demonstrative
legacy.

General legacy.

- (*r*) *Ashburner v. McGuire*, 2 C. 90.
 Bro. C. C. 108. (*u*) *Wilson v. Brownsmith*, 9
 (*s*) *Roberts v. Pocock*, 4 Ves. Ves. 180.
 150. (*x*) 1 Roper on Legacies, c. 3,
 (*t*) *Acton v. Acton*, 1 Meriv. s. 2.
 178; *Livesay v. Redfern*, 2 Y. &

Legacy for valuable consideration.

Dower.

pose; and should there be a deficiency, the amount of the stock, or the value of the ring to be purchased, would abate proportionably. If, however, any legacy should be given for a valuable consideration, it will not be liable to abatement with the other general legacies. An example of this exception to the usual rule occurred in the case of legacies given by husbands to their wives in consideration of their releasing their dower (*y*). And by the act for the amendment of the law relating to dower (*z*), it is provided (*a*) that nothing therein contained shall interfere with any rule of equity or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Satisfaction of debts by legacies.

When a legacy is bequeathed by a testator to his creditor, it is considered to be a satisfaction of the debt, if the legacy be equal to or greater than the amount of the debt (*b*). But if it be less than the debt (*c*), or payable at a different time (*d*), or of a different nature from the debt (*e*), or if the debt be contracted subsequently to the date of the will (*f*), or if the will contain an express direction for payment of debts and legacies (*g*), the legacy will not be a satisfaction. The leaning of the courts is against the doctrine of the satisfaction of debts by legacies, a doctrine which seems to have been established on rather questionable grounds. When, how-

(*y*) *Burridge v. Bradyl*, 1 P. Wms. 127; *Norcott v. Gordon*, 14 Sim. 258.

(*z*) Stat. 3 & 4 Will. IV. c. 105.

(*a*) Sect. 12.

(*b*) *Fowler v. Fowler*, 3 P. Wms. 353; *Fourdrin v. Gowdey*, 3 M. & K. 383, 409; 2 Roper on Legacies, c. 17, s. 1.

(*c*) *Graham v. Graham*, 1 Ves. sen. 262.

(*d*) *Nicholls v. Judson*, 2 Atk. 300; *Hales v. Darell*, 3 Beav. 324.

(*e*) *Alleyn v. Alleyn*, 2 Ves. sen. 37; *Bartlett v. Gillard*, 3 Russ. 149; *Fourdrin v. Gowdey*, 3 M. & K. 383, 409.

(*f*) *Craumer's case*, 2 Salk. 508.

(*g*) *Richardson v. Greese*, 3 Atk. 65.

ever, a sum of money is due to a child by way of portion, the inclination of the courts is against double portions; and a legacy to such child is accordingly regarded as a satisfaction of the portion either in part or in whole, notwithstanding such legacy may be less than the portion, or payable at a different period (*h*). A bequest of the residue, or of a share in the residue, of the testator's estate, will also be considered as a satisfaction pro tanto (*i*). The presumption of satisfaction is indeed so strong, that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both.

By a statute of George the Second, commonly called the Mortmain Act (*k*), no hereditaments, nor any money, stock in the public funds, or other personal estate whatsoever to be laid out in the purchase of hereditaments, can be conveyed or settled for any charitable uses (with a few exceptions) otherwise than by deed, with certain formalities mentioned in the act (*l*). This act has been very strictly construed, and has been held to prohibit the bequest for charitable purposes of personal estate in any degree savouring, as it is said, of the realty. Thus, it has been decided that money secured on mortgage (*m*), shares in a canal navigation (*n*), and leasehold estates (*o*), cannot be left by will for any charitable purpose. But more recently, the strictness of the courts appears to have relaxed; and it has been held that money secured by a policy of assurance, although the assurance com-

Satisfaction of portions.

Statute of Mortmain.

Bequest to charities.

(*h*) *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Weall v. Rice*, 2 Russ. & Myl. 251. (*m*) *Attorney-General v. Meyrick*, 2 Ves. sen. 44.

(*i*) *Rickman v. Morgan*, 2 B. C. C. 394; *Earl of Glengall v. Barnard*, 1 Keen, 769. (*n*) *Howse v. Chapman*, 4 Ves. 512; 1 Jarman on Wills, 199; *Tomlinson v. Tomlinson*, 9 Beav. 459.

(*k*) Stat. 9 Geo. II. c. 36.

(*o*) *Attorney-General v. Graves*,

(*l*) See Principles of the Law of Real Property, 55. Amb. 155.

pany may invest their funds in real estates (*p*), and shares in a gas company (*q*), and in the London, and East and West India Docks (*r*), are unaffected by the statute. There is no law which prevents the bequest of purely personal property to any amount for charitable purposes. A bequest to a charity ought, therefore, to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose. For if this precaution should be neglected, the charitable legacies will fail in the proportion which the personal assets savouring of the realty may bear to those which are purely personal (*s*).

Gifts to illegitimate children.

Other bequests which require some care are those to illegitimate children. It is very doubtful whether a bequest to the future illegitimate children of a particular woman is not void as tending to encourage immorality (*t*). And it is certain that a bequest to the future illegitimate children of a particular man is void, as the courts cannot enter into the inquiry which would be necessary to identify such children (*u*). A child *primâ facie* means a legitimate child: a bastard is considered by the law as *nullius filius*. Accordingly, an illegitimate child can never take under a gift to children, unless it be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken (*x*). An illegitimate child

(*p*) *March v. Attorney-General*, 5 Beav. 433.

(*q*) *Thompson v. Thompson*, 1 Coll. 381; *Sparling v. Parker*, 9 Beav. 450.

(*r*) *Hilton v. Giraud*, 1 De Gex & Smale, 183; *Sparling v. Parker*, 9 Beav. 450.

(*s*) *Attorney-General v. Tyndall*, 2 Eden, 207; S. C. 2 Amb. 611; *Hobson v. Blackburn*, 1 Keen, 273; *Philanthropic Society*

v. Kemp, 4 Beav. 581.

(*t*) See 2 Jarm. Wills, 153.

(*u*) *Wilkinson v. Adam*, 1 Ves. & Beames, 466; 2 Jarm. Wills, 155.

(*x*) *Cartwright v. Vardry*, 5 Ves. 530; *Godfrey v. Davis*, 6 Ves. 43; *Harris v. Lloyd*, 1 T. & Russ. 310; *Bagley v. Mollard*, 1 Russ. & M. 581; 2 Jarm. Wills, 140; *Dover v. Alexander*, 2 Hare, 275.

may, however, take under any gift in which he is sufficiently identified as the object of the testator's bounty. Thus, a bequest to the child of which a woman is now pregnant is good (*y*). And if illegitimate children have acquired the reputation of being the children of the testator or any other person, and it appear by necessary implication on the face of the will, that such persons were intended in a bequest to children, they will be entitled, not on account of their being children, but on account of their reputation as such (*z*).

After payment of the testator's debts and legacies, the residue of his personal estate must be paid over to the residuary legatee, if any, named in the will. A will of personal estate has always been considered as speaking from the death of the testator; and it is now expressly enacted that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*a*). Hence, it follows that all personal property acquired by the testator between the time of making his will and his decease, will pass under it. If any legacy should lapse by the death of the legatee in the testator's lifetime, or should fail from being contrary to law, it will fall into the residue, and belong to the residuary legatee. And a legacy will lapse by the death of the legatee in the testator's lifetime, although given to the legatee, his executors, administrators and assigns (*b*), for these words are merely inserted in analogy to the limitation of real estate to a man and his heirs. If a bequest be made to

Rights of residuary legatee.

Lapse.

Joint tenants.

(*y*) *Gordon v. Gordon*, 1 Meriv. You. & Coll. 525.

141. (a) Stat. 7 Will. IV. & 1 Vict.

(*z*) *Wilkinson v. Adam*, 1 Ves. c. 26, s. 24.

& B. 422; *Gill v. Shelley*, 2 Russ. (b) *Elliot v. Davenport*, 1 P.

& My. 336; *Meredith v. Farr*, 2 Wms. 83.

Tenants in
common.

Bequest to a
class.

Legacies to
children.

two or more as joint tenants, and one of them die in the lifetime of the testator, his share will not lapse but will survive to the others (*c*). But if the bequest be to two or more in common, and one of them die in the testator's lifetime, his share will lapse (*d*); unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease (*e*), and also (if the period of distribution be postponed by the will) all who come into being before such period (*f*), will be entitled to divide the bequest amongst them. It is, however, provided by the recent act for the amendment of the laws with respect to wills, that where any person, being a child or other issue of the testator, to whom any personal estate shall be bequeathed for any interest not determinable at or before the death of such person, shall die in the testator's lifetime leaving issue, and any such issue shall be living at the death of the testator, such bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*g*). The effect of this provision is curious. If the legatee had died immediately after the testator, leaving a will, it is evident that the estate bequeathed to him would have passed under his will. It has been decided therefore that the will of the legatee shall, after his death, operate on the estate bequeathed to him in the same manner as if he had been living (*h*). But this provision has been held not to apply to a testamentary appointment (*i*).

(*c*) *Morley v. Bird*, 3 Ves. 628, 631.

(*d*) *Bagwell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 P. Wms. 489; *Barber v. Barber*, 3 My. & Craig, 688; *Bain v. Lescher*, 11 Sim. 397.

(*e*) *Viner v. Francis* 2 Cox, 190; 2 Jarm. Wills, 74; *Lee v.*

Pain, 4 Hare, 250.

(*f*) *Ayton v. Ayton*, 1 Cox, 327; 2 Jarm. Wills, 75.

(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 33.

(*h*) *Johnson v. Johnson*, 3 Hare, 157.

(*i*) *Griffiths v. Gale*, 12 Sim. 354.

If there were no residuary legatee, the residue of the testator's personal estate, after payment of debts and legacies, formerly belonged to the executor for his own benefit, unless a contrary intention appeared from his being left executor in trust (*k*), or from his having a legacy left him for his trouble (*l*), or from other circumstances (*m*). But by a recent statute (*n*), it is now enacted that when any person shall die, having by will or codicil appointed any executor, such executor shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto (*o*), that the person so appointed executor was intended to take such residue beneficially. The Statute of Distributions is that under which the personal estate of any one dying intestate is distributed between his widow and next of kin. An account of this statute will be found in the next chapter.

Former right of executor to the residue.

Recent statute.

(*k*) *Pring v. Pring*, 2 Vern. 99; *Bagwell v. Dry*, 1 P. Wms. 700.

(*l*) *Rachfield v. Careless*, 2 P. Wms. 158.

(*m*) *Mullen v. Bowman*, 1 Coll. 197.

(*n*) Stat. 11 Geo. IV. & 1 Will. IV. c. 40.

(*o*) *Lane v. Gaze*, 8 Beav. 472.

CHAPTER IV.

OF INTESTACY.

Jurisdiction of
ecclesiastical
courts over
goods of intes-
tate persons.

THE ecclesiastical courts have jurisdiction not only over the wills of testators, but also over the goods of persons dying intestate. This jurisdiction, though of long standing, appears to have been at first gradually acquired. In early times the clergy, being possessed of almost all the learning, appear to have been the principal framers of wills. The power they thus acquired was exercised for their own benefit, every man being expected, on making his will, after bequeathing to his lord his heriot, in the next place to remember the church (*a*). If, however, a man should have died intestate, without opportunity of making this provision, the distribution of his goods devolved on the church, together with his friends, the lord first having taken his heriot (*b*). The wife and the children were entitled to their shares; and that part of the goods which the intestate had power to dispose of by his will (called the portion of the deceased) was applied by the church *in pios usus*. This application to pious uses appears to have been as follows: in the first place, the bequest, which it was to be presumed the intestate would have made to the church, was retained, and the residue was then disposed of in paying the debts of the deceased, and distributed amongst his wife and children, his parents and their relatives. That this was the case appears from the complaints which were made by the clergy of those days, of the interference of the temporal lords in cases of intestacy, whereby the distribution of the effects in the manner pointed out was pre-

Pious uses.

(*a*) Glanville, lib. 7, c. 5; Bract.
60 a; Fleta, lib. 2, c. 57.

(*b*) Bract. 60 b.; Fleta, ubi
supra.

vented (c). The clergy themselves, however, do not appear to have been always free from blame; for they are accused of having frequently taken the whole of the intestate's portion to themselves, making no distribution, or at least an undue one, amongst the creditors and relatives of the deceased (d); and, in order to remedy this evil, it was enacted in the reign of Edward I., by one of the very few statutes then passed relating to personal estate (e), that the ordinary should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt (f); but the right of the relatives to the surplus still remained undefined.

The duty of administering intestate's effects was not, Administrator. as may be supposed, usually performed by the bishops in person. For this purpose they usually appointed an administrator; but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself have a *locus standi* in the king's courts. It was accordingly enacted by a statute of the reign of Edward III. (g) that where a man died intestate the ordinaries should depute the next and most lawful friends of the deceased to administer his goods, which persons

- (c) Matthew Paris, 951, Ad- Gent. Mag. New Series, vol. ii.
ditamenta, 201, 204, 209 (Wats's 355, 474.
ed. London, 1640); Constitu-
tions of Boniface, Constitutiones (d) Fleta, lib. 2, c. 57.
Provinciales, 20, at the end of (e) Stat. 13 Edw. I. c. 19.
Lyndewode's Provinciale (Oxon. (f) 1 Ro. Abr. 906; Bac.
1679), recited also in a Consti- Abr. tit. Executors and Admi-
tution of Archbishop Stratford nistrators (E).
(Lynd. Prov. lib. 3, tit. 13). See (g) 31 Edw. III. c. 11.

so deputed should have action to demand and recover, as executors, the debts due to the deceased, to administer and dispend for the soul of the dead ; and should answer also, in the king's courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. By a subsequent statute (*h*) administration may be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary shall be thought good. The widow is usually preferred to the next of kin in the grant of administration (*i*) ; and a joint grant is seldom made, so seldom, indeed, that the powers of co-administrators appear to be still a matter of doubt (*k*). In granting administration to the next of kin, the ecclesiastical courts are guided by the right to the property to be administered (*l*). This right will be hereafter explained. If none of the next of kin will take out administration, a creditor may, by custom, do so, on the ground that he cannot be paid his debt until representation is made to the deceased (*m*) ; and for want of creditors, administration may be granted to any person at the discretion of the court (*n*).

Rights and
powers of admin-
istrator.

The administrator, when appointed, has, from the time of his appointment, the same right to, and power over, all the personal estate of the intestate as his executors would have had if he had made a will (*o*), and the same duty also devolves upon the administrator of paying the debts in the first place. He has also the same privilege as an executor of retaining his own debt

(*h*) 24 Hen. VIII. c. 5.

(*i*) *Webb v. Needham*, 1 Ad-
dams, 494.

(*k*) Shep. Touch. 485, 486 ;
Williams on Executors, pt. 2, bk.
1, c. 2.

(*l*) *In the goods of Gill*, 1

Hagg. 342.

(*m*) *Webb v. Needham*, 1 Ad-
dams, 494.

(*n*) Williams on Executors,
pt. 1, bk. 5, c. 2, s. 1.

(*o*) *Ibid.* pt. 2, bk. 1, ch. 1.

in preference to all others of the same degree (*p*). But the surplus, after payment of the debts, must be distributed amongst the relatives of the intestate in proportions to be hereafter mentioned. In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased, the same period of a year from the time of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution (*q*). But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of the decease of the intestate; so that in case any of them should die within a twelvemonth after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators (*r*).

Administrator's year.

In some instances administration is granted for a limited purpose, or confined to a given time. Of this we have already had an instance in the case of administration *durante minore ætate*, when the sole executor named in a will is under age (*s*); and the same sort of administration is granted on intestacy, in case of the minority of the next of kin (*t*). So if the executor or next of kin, as the case may be, should be out of the realm at the time of the decease of the testator or intestate, the ecclesiastical court will grant a limited administration *durante absentia*, which will expire the moment of the return of such executor or next of kin. And if the executor should prove the will, and afterwards go to reside out of the jurisdiction of the English courts, the ecclesiastical court, which granted probate of the will, is empowered by act of parliament (*u*) to grant

Limited administration.

Durante minore ætate.

Durante absentia.

- (*p*) *Warnerv. Wainsford*, Hob. Wms. 442.
 127; Williams on Executors, pt. 3, bk. 2, ch. 2, s. 6. (*s*) *Ante*, p. 238.
 (*q*) Stat. 22 & 23 Car. II. c. 10, s. 8. (*t*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.
 (*u*) Stat. 33 Geo. III. c. 87.
 (*r*) *Edwards v. Freeman*, 2 P. ss. 1—5.

administration, at the end of a year from the testator's death, limited for the purpose of the administrator's being made a party to a bill in chancery for carrying the decree of that court into effect; but where there are no proceedings in chancery, the act does not apply (*x*). Again, when a suit concerning the right of administration is pending in the ecclesiastical court, if the effects of the deceased are in the meantime in jeopardy, that court will appoint some fit person as an administrator *pendente lite*, to collect and take care of the estate; for which purpose he may maintain actions to recover the debts due to the deceased; but he has no authority to make any distribution (*y*). So if a will should have been made, but the executors should have renounced, or died before their testator, the ecclesiastical court will appoint the person having the greatest interest in the effects, generally the residuary legatee, to administer the same according to the directions of the will, in which case the administration granted is termed an administration *cum testamento annexo* with the will annexed (*z*).

Pendente lite.

Cum testamento annexo.

Court from which administration should be taken out.

Stamp duty on administrations.

With regard to the court from which administration ought to be taken out, the same rule of *bona notabilia* which governs the probate of wills (*a*) decides also the taking out of letters of administration. Letters of administration are also, as well as probates, liable to the payment of an *ad valorem* stamp duty on the value of the personal estate of the deceased within the jurisdiction of the spiritual judge who grants the administration; but the duty on letters of administration, where there is no will, is after a higher rate than the duty on probates, or on letters of administration with the will annexed (*b*). A heavy penalty is imposed by the Stamp

(*x*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 5.

(*y*) *Ibid.* pt. 1, bk. 5, ch. 3, s. 4.

(*z*) *Ibid.* pt. 1, bk. 5, ch. 3, s. 1.

(*a*) See *ante*, p. 242.

(*b*) Stat 55 Geo. III. c. 181.

Act on any person who shall take possession of, or in any manner administer any part of the personal estate of any deceased person, without obtaining probate or administration within six calendar months after his or her decease, or within two calendar months after the determination of any suit or dispute respecting the will or the right to administration (c). The same exemptions from duty in favor of seamen, marines and soldiers, and also in favor of small-depositors, in savings' banks, which have been established, with respect to the probate duty (d), apply also to the duty on letters of administration.

Exemptions.

The office of administrator is not transmissible, like the office of executor. On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor (e). In each of these cases, the administration granted is called an administration *de bonis non administratis*, of the goods not administered, or, more shortly, *de bonis non* (f).

Office of administrator is not transmissible.

Administration *de bonis non*.

The application of an intestate's effects, after payment of his debts, is now regulated by statutes of the reign of Charles H. and James H. (g), commonly called the

Statutes of Distribution.

(c) 100*l.*, and ten per cent. on the stamp duty. Stat. 55 Geo. III. c. 184, s. 37.

(d) *Ante*, p. 244.

(e) Shep. Touch. 465; Williams on Exors. pt. i. bk. 3, ch. 4.

(f) Williams on Exors. pt. i. bk. 5, ch. 3, s. 2.

(g) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7; see Watkins on Descents, Appendix, 257, *et seq.* 4th edit.

Statutes of Distribution, by which statutes the rights of the relations of the deceased appear to have been first definitively ascertained, and rendered legally available.

Widow's share.

Under these statutes, if the intestate leave a widow and any child or children, or descendant of any child, the widow shall take a third part of the surplus of his effects. If he leave no child, nor descendant of any child, she shall have a moiety. In this respect, the distribution is the same as took place under the ancient law. The husband of a married woman is entitled to the whole of her effects (*h*). If the intestate leave children, two-thirds of his effects if he leave a widow, or the whole if he leave no widow, shall be equally divided amongst his children, or, if but one, to such one child.

Shares of children.

But the descendants of such children as may have died in the intestate's lifetime, shall stand in the place of their parent or ancestor (*i*). Such children, however, as have been advanced by the parent in his lifetime must bring the amount of their advancement into hotchpot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir at law, notwithstanding any land he may have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land (*k*). If the intestate leave no children or representatives of them, his father, if living, takes the whole; or, if the intestate should have left a widow, one-half. If the father be dead, the mother, brothers and sisters of the intestate shall take in equal shares (*l*), subject, as before, to the widow's right to a moiety; and brothers or sisters of the half blood have an equal claim with those of the whole blood (*m*). If any brother or sister shall have

And their descendants.

Advancements to be accounted for.

Father of intestate.

Mother, brothers and sisters.

(*h*) Stat. 29 Car. II. c. 3, s. 25.

(*l*) Stat. 1 Jac. II. c. 17, s. 7.

(*i*) See Burton's Compendium, pl. 1402.

(*m*) *Jessopp v. Watson*, 1 My. & K. 665; *Burnet v. Mann*, 1

(*k*) Stat. 22 & 23 Car. II. c. 10, s. 5.

My. & K. 672, n.

died in the lifetime of the intestate, leaving children, such children shall stand in *loco parentis*, provided the mother or any brother or sister be living (*n*). If there be no brother or sister, nor child of such brother or sister, the mother shall take the whole, or, if the widow be living, a moiety only, as before; but a stepmother can take nothing (*o*). If there be no mother, the brothers and sisters take equally, the children of such as may be dead standing in *loco parentis*. Beyond brothers' and sisters' children, no right of representation belongs to the children of relatives with respect to the shares which their deceased parents would have taken. And if there be neither brother, sister, nor mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him.

Next of kin.

*You stupid a
asked for the*

In tracing the degrees of kindred, in the distribution of an intestate's personal estate, no preference is given to males over females, nor to the paternal over the maternal line (*p*), nor to the whole over the half blood, as in the case of descent of real estate; nor does the issue stand in the place of the ancestor. The degrees of kindred are reckoned according to the civil law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree (*q*). Thus from father to son, or from son to father, is one degree; from grandfather to grandson, or from grandson to grandfather, is two degrees; and from brother to brother is also two degrees, namely, one upwards to the father, and one downwards to the other son. So from uncle to nephew

Degrees of
kindred traced
according to
the civil law.

(*n*) *Lloyd v. Tench*, 2 Ves. sen. 215; *Durant v. Prestwood*, 1 Atk. 454; West, 448.

(*o*) *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 216.

(*p*) *Moor v. Barham*, 1 P. Wms. 53.

(*q*) *Mentmy v. Petty*, Pre. Cha. 593; *Wallis v. Hodson*, 2 Atk. 117; 2 Black. Com. 504, 515.

is three degrees, one upwards to the common ancestor, and two downwards from him; and from nephew to uncle is also three degrees, two upwards and one downwards. If therefore there be neither issue, father, brother, sister nor mother of the intestate living, such persons as are his next of kin, according to the rule above laid down, are entitled in equal shares *per capita* to his personal estate, subject to his wife's right to a moiety, should she survive him. As the kindred becomes more distant, the number of persons entitled, if living, as well as the difficulty of proving their respective pedigrees, becomes prodigiously augmented. "It is at the first view astonishing," says Blackstone (r), "to consider the number of lineal ancestors which every man has within no very great number of degrees: and so many different bloods is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents: he hath four in the second, the parents of his father and the parents of his mother: he hath eight in the third, the parents of his two grandfathers and two grandmothers: and, by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate." The number of collateral relations who may claim through such ancestors is of course far more numerous.

Customs of
London and
York.

The estates of intestate freemen of the city of London (s), and of persons having their fixed or general residence within the archiepiscopal province of York (excepting the diocese of Chester), are distributed according to peculiar customs, apparently derived from

(r) 2 Black. Com. 203.

(s) *Onslow v. Onslow*, 1 Sim. 18.

the ancient mode of distribution (*t*). Some parts of Wales. Wales also appear to be still subject to peculiar customs of distribution: for these several customs, though postponed to the right of testamentary disposition by the statutes to which we have already referred (*u*), were nevertheless not abolished by those statutes in the event of no will being made.

The shares of persons claiming any personal estate of the amount or value of 20*l.* or upwards under an intestacy, are subject to the same duty as legacies to persons of the same degree of kindred (*x*). If there be no next of kin, the crown, by virtue of its prerogative, will stand in their place, but subject always to the widow's right to a moiety in case she should survive (*y*).

Duty on shares of an intestate's estate.

The crown.

The division of the personal estate of an intestate, effected by the Statute of Distributions, is remarkable for its fairness. The only provision which might be amended is that which places the half-blood on an equality with the whole. A corresponding equality in interest and feeling but rarely exists in actual life. The proper place for the half-blood appears to be that now assigned to them in the descent of real estate, according to the recommendation of the Real Property Commissioners, namely, next after those of the same degree of the whole blood (*z*). The appointment of an executor or administrator, in whom the whole personal property is vested with full power of disposition, tends greatly to simplify the title to leasehold estates and other property of a personal nature. It could be wished, however, that the

Place of the half-blood.

probably the more who question has a well kept track of admitting a good many more a damn fool than who write in the plat

(*t*) Williams on Executors, pt. 3, bk. 4, ch. 2.

(*u*) *Ante*, p. 233.

(*x*) Stat. 55 Geo. III. c. 184.

See *ante*, p. 260.

(*y*) *Cave v. Roberts*, 8 Sim. 214.

(*z*) See Principles of the Law of Real Property, 77.

office of an administrator were transmissible in the same manner as that of an executor. And the circumstance of the personal estate of deceased persons being under the jurisdiction of the ecclesiastical courts, is not one of the considerations which would induce a preference of the system adopted in regard to the personal property of an intestate, over that which exists with respect to his real estate. In other respects, however, the distribution of personal estate on intestacy approaches far more nearly to the disposition which the deceased himself would probably have made, than the descent of real property, either at the common law or according to the custom of gavelkind. A person possessed only of small landed property usually devises it to trustees for sale, with full power to give receipts to purchasers, and directs the division of the produce by his trustees amongst his children in such shares as he may think just, with regard to the provision already made for any of them in his lifetime. He does not leave his younger children to beggary in order that his whole property may devolve to his eldest son according to the course of the common law, a course pursued, as the author believes, in no other civilized country in the world (*a*). Neither does he leave it to all his sons equally in undivided shares, thus inflicting an injustice on his daughters, and allowing all plans for the improvement of the lands to be checked by one dissentient voice, unless a partition should be resorted to, by which the property would be split up into parcels too small for the convenience of agriculture. If by any accident a man should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention. It is true that when property is large, it is usually entailed on the eldest son and his issue, subject to moderate portions for the

Points in which
distribution is
preferable to
descent.

(*a*) Co. Litt. 191 a, n. (1), vi. 4.

younger children. This custom of primogeniture is Primogeniture. suited to the institutions of our country, and to the habits of the class to which large landed property usually belongs, and the author has no wish to see it disturbed. The settlements, however, by which these entails are created are more frequently made by deed than by will. They almost invariably contain provisions for the portions of younger children, varying in amount with the value of the property ; and, whether made by deed or will, they are usually long and intricate in their nature, providing for the numerous contingencies which may arise under the peculiar circumstances of each family. Nothing in fact can be more different than the devolution of an estate to the eldest son under a family settlement, and the descent on an intestacy to the eldest son as heir at law. In the one case he takes subject to the proper claims of the other members of his family ; in the other he is bound to them by no obligation at all. There seems to be no method of making, in case of intestacy, any sort of disposition of landed property which might be reasonably simple, and at the same time resemble an ordinary family settlement. If such a settlement be not made by deed, the owner has ample power of effecting the same object by his will. Intestacy, in fact, rarely happens to the owner of large landed property. The property which descends to heirs under intestacies, though large in the aggregate, is generally small in individual cases. When the wishes of all cannot be consulted, that which would have been the wish of the generality of intestates ought apparently to form the foundation of the rule. From a consideration of these circumstances the reader may perhaps be induced to think, that if, in case of intestacy, the rules for the devolution of real and personal estate were identical, and with some slight variations similar to those which now exists as to personalty, the law on this subject would be rendered both more simple and more just.

Descent and
devolution to
distant heirs
and kindred.

The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation, the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they had never expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations, is not unfrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appears to the author, be very properly made by the devolution to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him,—claims which seem preferable to those of the man who, in the case of real estate, founds his title on his descent from the *most remote* male paternal ancestor of the intestate (*b*), or who claims a share in the personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred, which increases, as it grows distant, in geometrical progression.

(*b*) See Principles of the Law of Real Property, 78.

CHAPTER V.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

MARRIAGE being essential to the welfare of the community, and also involving important consequences to the individuals concerned, is not on the one hand allowed to be unduly restrained, nor on the other to be brought about by unfair means.

Amongst the many striking differences between the laws of real and personal property, by which our legal system is complicated, will be found the rules relating to attempted restraints on marriage. Real estate is governed by the rules of the common law; but personal estate when bequeathed by will has, as we have seen (a), long been subject to the jurisdiction of the ecclesiastical courts. These courts have adopted, with some modification, the rules of the civil law, which is more favourable than the common law of England to liberty of choice in marriage. Hence it follows that some restrictions on marriage, which are valid when applied to a gift of real estate, are void when attempted to be imposed on a gift of personal property. The rules respecting real and personal estate so far agree that a condition annexed to a gift of either that a man shall not marry at all is void (b). But a gift of either by a husband to his wife during her widowhood is valid (c); neither would a gift of the income of property to a single person until marriage, with a gift over on marriage,

Restraints on marriage.

(a) *Ante*, p. 241.

& Cr. 145; *Morley v. Rennoldson*, 2 Hare, 570.

(b) *Shep. Touch.* 132; *Perrin v. Lyon*, 9 East, 170, 183; *Rish-ton v. Cobb*, 9 Sim. 615; 5 My.

(c) *Barton v. Barton*, 2 Vern. 308.

Marriage with-
out consent.

appear to be invalid(*d*). When, however, a gift is made with a condition that it shall be forfeited if the donee marry without the consent of certain trustees or other persons, the difference between the laws of real and personal estate becomes conspicuous. If the gift be of real estate, or of money charged on real estate, it will cease on the event of marriage without the required consent(*e*). But if it be a bequest of personal property, the condition is regarded as merely *in terrorem* and void(*f*), unless accompanied by a bequest over to some other person on the marriage taking place without consent(*g*); so that the legatee will be entitled to retain the legacy, notwithstanding his or her marriage without consent, unless on that event it be expressly given in some other manner. Such conditions in bequests of personalty when unaccompanied by a gift over are called *in terrorem*, because, says Lord Eldon, "they are supposed to alarm persons, when we know they contain no terror whatsoever(*h*)."

Marriage bro-
cage.

In order to prevent marriages from being unfairly obtained, it is a rule of equity that all contracts for reward for procuring marriages (called marriage brokerage) are void(*i*). And if a parent or guardian should stipulate for any private benefit for the marriage of his child or ward, such stipulation would be void, and money actually paid under it would be decreed to be refunded(*k*).

Marriage settle-
ments.

Few marriages are now contracted between persons

(*d*) See *Right d. Compton v. Compton*, 9 East, 267; *Morley v. Rennoldson*, 2 Hare, 570, 580. 361; *Clarke v. Parker*, 19 Ves. 1, 13.

(*e*) *Reynish v. Martin*, 3 Atk. 330, 333. (*h*) 19 Ves. 13.

(*f*) *Bellasis v. Ermine*, 1 Cha. Ca. 22. (*i*) *Hall v. Potter*, 3 Levinz, 111; Shower's Par. Cases, 76.

(*g*) *Stratton v. Grymes*, 2 Vern. 357; *Harvey v. Aston*, 1 Atk. 262; *Smith v. Brunning*, 2 Vern. 392.

(*k*) 1 Fonblanque on Equity, 262; *Smith v. Brunning*, 2 Vern. 392.

possessing any amount of property, without a previous settlement of such property being made, in some stipulated manner, for the benefit of the intended husband and wife and the children of the marriage. As marriage is a valuable consideration (*l*), such settlements are binding on both parties if of full age. But if either husband or wife should be under age, the settlement will not be binding on him or her (*m*), although the other party, if of full age, will be bound by it (*n*). And if both of them should be under age, neither of them will be bound by it. The circumstance of the settlement of an infant's personal property being fair and reasonable, and made with the approbation of his or her guardians, was formerly considered as giving it validity (*o*); but this circumstance seems now to have no weight. It has, however, been decided that a competent legal jointure (*p*) settled on the intended wife, then an infant, with the concurrence of her guardians, in lieu of her right to dower out of her husband's freehold lands, and in lieu of her distributive share of his personal estate in the event of his intestacy, was sufficient to deprive her both of her dower and of her distributive share in her husband's personalty (*q*). When the intended wife only is an infant, a settlement of her personal estate in possession is valid, on account of the interest which, as we shall see, the law gives to the husband in such personal estate. The settlement in such a case is in fact not made by the wife, but by the husband, who, being adult, is bound by its provisions

Not binding on party under age.

(*l*) *Ante*, p. 63.

(*m*) *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrutton*, 14 Sim. 116.

(*n*) *Dunford v. Lane*, 1 Bro. C. C. 106; *Milner v. Lord Harewood*, 18 Ves. 299

(*o*) 2 Roper's Husband and Wife, 26.

(*p*) See Principles of the Law of Real Property, 174.

(*q*) *Earl of Buckingham v. Drury*, 3 Brown's Par. Cas. 492

to the extent of the interest which he would have taken had no settlement been made (r).

Ancient rights
of husband and
wife.

If no settlement be made, the principles which govern the rights of husband and wife to personal property must still be traced to the circumstances of ancient rather than of modern times. In ancient times landed property was by far the most important; and the wife was accordingly entitled to a provision out of the lands of her husband, in the event of her surviving him, which no alienation that he could make, nor any debts which he might incur, were able to set aside (s). But in those days personal property was of too insignificant a value to be the subject of any such provision. And if a woman now marry without a settlement, she has still no claim on her husband's personal estate, however large, unless he should happen to die intestate, in which case, as we have already mentioned, she is entitled to a third or a half of what he may leave, according as he may or may not leave issue surviving him. A husband, on the other hand, was in ancient times considered absolutely entitled to such personal chattels as his wife might possess. In this respect the law was then both simple and sufficient. By the act of marriage, the wife placed herself under the coverture or protection of her husband. She became in the law French of those days a *feme covert*. Thenceforth all demands to which she was personally liable were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person (t). So long therefore as the coverture continued, that is, during the joint lives of the husband and wife, the husband was absolutely entitled to all personal property which

(r) *Trollope v. Linton*, 1 Sim. of Real Property, 172.
& Stu. 477, 485. (t) *Ibid.* 161.

(s) See Principles of the Law

his wife might acquire, and was also liable to the payment of all debts which she might previously have incurred. These simple principles still pervade the law relating to the husband's interest in his wife's personal estate, although the several different species of personal estate to which modern civilization has given rise, conjoined with the rules of equitable administration laid down by the Court of Chancery, have given to this branch of law a perplexity unknown to the simple, though somewhat harsh, rules of our ancestors.

In the first place then, personal property of the ancient kind, namely, chattels personal or moveable goods, belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him (*u*). He may dispose of them as he pleases in his lifetime or by his will; they will be subject to his debts; and if he should die intestate, the wife will have no further claim to them than to any other of his effects.

The wife's chattels personal belong to her husband.

The only exceptions to this sweeping rule are the wife's *paraphernalia*, so called from the Greek *παράφερνη*, being things to which the wife is entitled over and above her dower. The wife's paraphernalia consist of her apparel and ornaments suitable to her rank and degree (*x*); and gifts made by the husband to his wife of jewels or trinkets to be worn by her as ornaments are considered as part of her paraphernalia (*y*). These articles, equally with the wife's other personal chattels, may be disposed

Paraphernalia.

(*u*) Co. Litt. 300 a, 351 b; Husb. and Wife, 140; 11 Vin. Bac. Abr. tit. Baron and Feme, Abr. tit. Executors (Z. 5.) (C) 3; 1 Rep. Husb. and Wife, 169. (*y*) *Graham v. Londonderry*, 3 Atk. 394.

(*r*) 2 Bl. Com. 436; 2 Rep.

of by the husband in his lifetime (*z*), and, with the exception of the wife's necessary clothing, are also liable to his debts (*a*). The wife also herself has no power to dispose of them by gift or will during her husband's lifetime (*b*). But paraphernalia differ from the wife's other personal chattels in this respect, that the husband, though he may dispose of them in his lifetime, has no power to bequeath them away from his wife by his will (*c*). Gifts of jewels or trinkets made to the wife by a relative or friend, either upon or after her marriage, will generally be considered in equity as intended for her *separate use* (*d*), in which case they will not be reckoned amongst her paraphernalia, but will, as we shall hereafter see, be exempt from the control and debts of her husband, and may be disposed of by the wife in the same manner as if she were unmarried.

Choses in
action.

With regard to such of the wife's personal estate as is not in possession, but for which she has only a right to sue, the rights of the husband are different, according as the proceedings against the persons liable to be sued must be taken in a court of law or of equity. Property of this nature, as we have already seen (*e*), is termed in law French *choses in action*: such as may be recovered by action at law are called legal choses in action, and such as must be recovered by suit in equity are called equitable choses in action. With regard to each of them, the rights of the husband are of a different kind, although in each the same rule applies, that if he can get them into his possession during the coverture he

(*z*) *Ibid.*; 2 Rep. Husb. and Wife, 141.

(*a*) 2 Bl. Com. 436; *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Lord Townshend v. Windham*, 2 Ves. sen. 1, 7.

(*b*) 2 Rep. Husb. and Wife, 141.

(*c*) *Tipping v. Tipping*, 1 P. Wms. 730; *Northey v. Northey*, 2 Atk. 77.

(*d*) *Graham v. Loudonderry*, 3 Atk. 391; 2 Rep. Husb. and Wife, 143.

(*e*) *Aut.*, p. 4.

has a right to keep them, otherwise they will still belong to his wife (*f*).

Legal choses in action consist principally of debts due to the wife, and secured or not by bond, or by bills or promissory notes. Of all these the husband has a right to receive payment, and should payment be refused him, he may sue for them in the joint names of himself and his wife (*g*); but bills and notes of the wife payable to order being transferable by indorsement, may be indorsed by the husband alone (*h*), or sued for in his own name (*i*). All such legal choses in action as accrued to the wife *after* her marriage, may be sued for by the husband, either in the joint names of himself and his wife, or in his own name only (*k*); but if the wife has really no interest he cannot of course make use of her name (*l*). If the husband should sue in the joint names of himself and his wife, the benefit of the judgment of the court will in case of his decease survive to her (*m*); but if he sue in his own name the benefit of the judgment will form part of his own personalty. If however the husband should not have received the money in his lifetime, or should not have obtained judgment for it in his own name, his wife will, on his decease, be entitled by survivorship to the chose in action so remaining still unreduced into possession (*n*); and bills and notes form no exception to this

(*f*) 2 Bl. Com. 434; 1 Wms. on Executors, pt. 2, bk. 3, ch. 1, s. 3.

(*g*) 1 Rep. Husb. and Wife, 213, 214; *Sherrington v. Yates*, 12 Mcc. & Wels. 855. In this case the note was not payable to order, and therefore not negotiable.

(*h*) *Mason v. Morgan*, 2 Ad.

& El. 30.

(*i*) *Burrough v. Moss*, 10 Barn. & Cress. 558.

(*k*) 1 Rep. Husb. and Wife, 213.

(*l*) *Abbot v. Blofield*, Cro. Jac. 644.

(*m*) 1 Vern. 396; 1 Rep. Husb. and Wife, 212.

(*n*) Co. Litt. 351 b.

Husband surviving must take out administration.

Exception.

rule (*o*). But, if the wife should die before her husband, these choses in action, still remaining unreduced, will form part of her personal estate; and her husband must take out administration to her effects before he can proceed to recover them (*p*): when recovered, they will, with the rest of her personalty, belong to himself absolutely, after payment of her debts (*q*). The only exception to this rule occurs in the case of the husband being entitled, in right of his wife, to "any estate in fee simple, fee tail, or for term of life, of or in any rents or fee farms," in which case the husband, after the death of his wife, is empowered by statute (*r*) to recover the arrears accrued to his wife before marriage, by action of debt or distress. But this provision does not apply to the rents reserved upon leases for years (*s*).

Equitable choses in action.

Equitable choses in action consist principally of legacies, residuary personal estate of testators, and money in the funds. But all kinds of property, including, as is now decided, both freehold estates (*t*) and chattels real (*u*), vested in trustees who are answerable only to the Court of Chancery, are subject to a rule of equity, by which equitable choses in action are mainly distinguished from such as are merely legal. This rule is as follows: that the Court of Chancery will not assist, nor, if the wife should dissent, will it allow the husband to recover or receive any property of his wife exceeding in amount the sum of 200*l.*, and recoverable only in that

(*o*) *Richards v. Richards*, 2 Barn. & Adol. 447; *Guters v. Madeley*, 6 Mee. & Wels. 123; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 864.

(*p*) 1 Rep. Husb. and Wife, 205; see *Betts v. Kimpton*, 2 B. & Adol. 273.

(*q*) Stat. 29 Car. II. c. 3, s. 25, *ante*, p. 262.

(*r*) Stat. 32 Hen. VIII. c. 37, s. 3.

(*s*) *Prescott v. Boucher*, 3 Barn. & Adol. 819.

(*t*) *Sturgis v. Champneys*, 5 Myl. & Cr. 97.

(*u*) *Hanson v. Keating*, 4 Hare, 1.

court, without his settling a due proportion of such property on his wife and children. The right of the wife to such a provision is termed *the wife's equity for a settlement* (*x*). The proportion settled on her is most frequently one-half (*y*); and sometimes the court has gone so far as to require a settlement of the whole fund (*z*). Although the children are usually inserted in the settlement, yet the right is personal to the wife, and may be waived by her (*a*); nor will it survive to the children in case of her decease before the court has made its decree (*b*); but if she die after the decree, it will still be carried into effect for the benefit of the children (*c*). This rule of the Court of Chancery is founded on one of the maxims of equity, that he who would have equity must do what is equitable (*d*); and the court possesses, in its Master's offices, machinery adapted for carrying the rule into effect. If, however, as most frequently happens, the husband can obtain from the executor or trustee of the fund in question payment of it to himself, without the assistance of the court, he has a right to do so, and in this case the wife's equity is at once excluded; and if the time of payment has arrived, the executor or trustee may safely pay over the fund to the husband, unless the wife should have already filed her bill in Chancery to enforce her right to a settlement (*e*); and the receipt of the fund by the husband,

Wife's equity
for a settlement.

(*x*) 1 *Rop. Husb. and Wife*, 256
et seq.

(*y*) 1 *Rop. Husb. and Wife*,
260; *Archer v. Gardiner*, 1 *C. P.*
Coop. 340.

(*z*) *Brett v. Greenwell*, 3 *You.*
& *Coll.* 230; *Gardner v. Marshall*,
14 *Sim.* 575. See however *Napier*
v. Napier, 1 *Dru. & War.* 407.

(*a*) *Murray v. Lord Elbank*,
13 *Ves.* 6. But the wife having
once insisted on her right cannot
afterwards waive it: *Barker v.*

Lea, 6 *Mad.* 330; *Whittem v.*
Saryer, 1 *Beav.* 593.

(*b*) *De la Garde v. Lempricre*,
6 *Beav.* 311, overruling *Steinmütz*
v. Halthin, 1 *Glyn & Jam.* 61.

(*c*) *Groves v. Clarke*, 1 *Keen*,
132; *S. C. Groves v. Perkins*, 6
Sim. 584.

(*d*) 2 *P. Wms.* 611.

(*e*) 1 *Rop. Husb. and Wife*,
273; *Murray v. Lord Elbank*,
10 *Ves.* 90.

when it has thus become payable, is also an effectual bar to the wife's right by survivorship (*f*).

Effect of the husband's assignment.

If the husband, instead of obtaining payment of the fund, should assign it to a third person (*g*), or if he should become bankrupt or insolvent (*h*), his assignee will take, subject to the wife's equity for a settlement, in the same manner as if no assignment had been made. And if the husband should die before the assignee has got possession of the fund, leaving his wife surviving, the wife's right by survivorship will prevail over the title of the assignees, whether in bankruptcy or insolvency (*i*), or for valuable consideration (*j*).

Assignment of wife's reversionary choses in action.

If the wife should be entitled to any chose in action, whether legal or equitable, of a reversionary nature, that is, not immediately recoverable, the effect of an assignment by the husband will be different under different circumstances. The wife, of course, cannot assign, for by the act of marriage she deprives herself of all power so to do; and the husband can only assign to another the interest to which he may be entitled himself. Suppose therefore that the wife is entitled, on the death of A. a person now living, to a sum of stock standing in the names of trustees, and that her husband should make an assignment of this reversionary interest to B., a purchaser. The benefit which will accrue to B. by virtue of this assignment will vary according as the husband, the wife, or A., the tenant for life, may happen to die

Example.

(*f*) 1 Rop. Husb. and Wife, 220; *Rces v. Keith*, 11 Sim. 383.

v. Hall, 2 Russ. & M. 175, 182.

(*g*) 1 Roper's Husband and Wife, 271; *Malcolm v. Charlesworth*, 1 Keen, 73, 71. But when the wife has only a life interest, she is not entitled to a settlement as against a particular assignee for valuable consideration; *Elliott v. Cordell*, 5 Madd. 149; *Stanton*

(*h*) 1 Roper's Husband and Wife, 268.

(*i*) *Pierce v. Thornely*, 2 Sim. 167.

(*j*) *Hutchings v. Smith*, 9 Sim. 137; *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Coll. 553; *Le Vasseur v. Scrutton*, 14 Sim. 116.

first. If the husband should die first, B. will lose his purchase; for the wife, having survived her husband, will now on the death of A. be entitled to the stock, which has never been reduced into the possession of her husband, or of B., his assignee (*k*). If A. should die first, B. may then obtain a transfer of the stock, if the trustees choose to transfer it to him, and if the wife should not have filed a bill to enforce her equity to a settlement. But if the trustees should refuse to transfer without the direction of the Court of Chancery, or if the wife should insist upon her right, then B. will, as we have seen (*l*), most probably obtain only half of the fund for his own benefit, and will be obliged to settle the other half on the wife and children. If, however, the wife should die first, then this chose in action, remaining unreduced into possession, will, like a legal chose in action under the same circumstances (*m*), remain part of the wife's personal estate; and the husband, on taking out administration to his wife, will be bound by his previous assignment. B. will accordingly in this single event obtain the whole fund, subject however to the wife's debts, if any. It has recently been decided that if an assignment can be obtained from the tenant for life, of his life interest in a fund circumstanced as above mentioned, to the married woman entitled to the reversion, she will be in the same situation as if the whole fund had been originally held in trust for her absolutely; and that after such an assignment, the whole fund may therefore be transferred to the husband (*n*). But it is contrary to the general principles of equity to allow the rights of parties to be affected by any merger or extinguishment of interests; and the doctrine in question has not met with the approbation of every branch of the court (*o*).

(*k*) *Purdew v. Jackson*, 1 Russ. 592; *Hall v. Hugonin*, 14 Sim. 1; *Honner v. Morton*, 3 Russ. 65. 595; *Bishopp v. Colebrook*, V. C. E. 11 Jur. 793.

(*l*) *Ante*, p. 277.

(*m*) *Ante*, p. 276.

(*n*) *Creed v. Perry*, 14 Sim. 12 Jurist, 298. — also 1079

This reversed all the previous decisions (as Hall v. Hugonin)

Husband's liability to his wife's debts.

The same principle of the merger of the wife in the husband, which gives him such important rights in her personal estate, renders him also answerable for all the debts and liabilities of his wife contracted previously to her marriage (*p*). But if judgment for any debt be not recovered during the continuance of the marriage, the liability ceases, except to the extent of the assets to which the husband may be entitled as his wife's administrator (*q*). And if the wife survive, she will again become solely liable. The husband is also bound during the coverture to supply his wife with necessaries suitable to her station in life. She is therefore, whilst living with him, considered as his agent for the purchase of any such necessary articles with which he may not have supplied her (*r*). And even if the articles should not be necessaries, yet if the husband be aware of the purchase (*s*), or if he recognize it, by allowing his wife to use or wear the articles bought (*t*), she will be considered as having bought them with his authority, and he will consequently be liable to pay for them.

Fraud on the husband's marital rights.

The burdens with which the husband is thus chargeable are the consideration which he pays for his marital rights in his wife's property. It is therefore a rule of law, that the husband shall not, previously to the marriage, be defrauded of those rights by his intended wife (*u*). Accordingly if the wife, after an engagement to marry, should assign away any of her property without the knowledge and consent of her intended husband, such assignment would be void, as a fraud on his marital

(*p*) 2 Roper's Husband and Wife, 73; *Palmer v. Wakefield*, 3 Beav. 227.

(*q*) *Heard v. Stamford*, 3 P. Wms. 409.

(*r*) 2 Roper's Husband and Wife, 110; *Seaton v. Benedict*, 5

Bing. 28.

(*s*) *Petty v. Anderson*, 3 Bing. 170.

(*t*) See *Montague v. Benedict*, 3 Barn. & Cress. 631, 638.

(*u*) *Countess of Strathmore v. Bowes*, 1 Ves. jun. 22, 28.

rights (*x*). And the circumstance of the intended husband's being ignorant of her possession of the property in question would be immaterial (*y*).

The right of the husband to the whole of his wife's personal estate, in the event of her decease in his lifetime, may be waived by his giving her authority to dispose of such estate, or any part of it, by her will; and such a will will be valid and binding on the husband if he once allow it to be proved (*z*). But during the wife's lifetime, and even after her death until probate of the will, this authority may be revoked; and if the husband should die before the wife, such a will would not be binding on the wife's next of kin (*a*).

The husband may authorize his wife to dispose of her personal estate by her will.

But at the present day, power to dispose of property of any kind may be given to a married woman, independently of her husband, by means of a trust for her *separate use*, which trust will be enforced in equity (*b*). When personal estate is so given, the wife has the same powers of ownership as if she were a feme sole; she may accordingly dispose of such property without her husband's concurrence, either in her lifetime or by her will (*c*). But should she die in his lifetime without having made any disposition, her husband will become entitled to it either in his marital right (*d*) or as her administrator (*e*), according as the property may be in possession or in action. A trust for a woman's *separate*

Trusts for the wife's separate use.

(*x*) *England v. Downs*, 2 Beav. 522; *Taylor v. Pugh*, 1 Hare, 608.

(*y*) *Goddard v. Snow*, 1 Russ. 485.

(*z*) 1 Rop. Husb. and Wife, 169, 170.

(*a*) 15 Ves. 156.

(*b*) See Principles of the Law of Real Property, 161.

(*c*) *Fettiplace v. Gorges*, 1 Ves. jun. 46; S. C. 3 Bro. C. C. 8; 2 Rop. Husb. and Wife, 182.

(*d*) *Molony v. Kennedy*, 10 Sim. 254; *Tugman v. Hopkins*, 4 Man. & Gran. 381.

(*e*) *Watt v. Watt*, 3 Ves. 246, 247; *Proudley v. Fielder*, 2 My. & Keen, 57.

use is properly and technically created by means of the words "separate use." But a gift to a woman for her sole use (*f*), or a direction that her receipt alone shall be a sufficient discharge (*g*), will also create a trust for her separate use. A gift, however, to a woman for her own use (*h*), or to be paid into her proper hands (*i*), or even to be paid into her proper hands for her own proper use and benefit (*k*), will not be sufficient to exclude the rights of her husband.

Gifts of income
for a woman's
separate use.

A simple gift of property for a married woman's separate use is not so usual as the gift of the income only of the property during her life or during the joint lives of herself and her husband (*l*). A gift of the income of property to a woman's separate use may be made either after her marriage, or in contemplation of marriage, or whilst she is sole; and the gift may be made either independently of her present husband, if any, or of any future husband. When the gift is made to a woman's separate use, independently of any future husband, the act of her marriage will confer no interest in the property on her husband, but she will enjoy, after marriage, the same interest and power of disposition as she had before (*m*). It is, however, more usual, when the income only of property is given to a wife's separate use, to insert a condition that she shall not dispose of the same in any mode of anticipation. Conditions restraining the alienation of property are generally invalid, as being contrary to the policy of the law. But the courts of equity have made an exception to this rule in

Restraint on
anticipation.

- (*f*) — *v. Lyne*, Younge, 562. (*k*) *Blacklow v. Laws*, 2 Hare,
(*g*) *Lee v. Prieux*, 3 Bro. C. 49.
C. 381. (*l*) See Appendix C.
(*h*) *Roberts v. Spicer*, 5 Madd. (*m*) *Tullett v. Armstrong*, 1
491; *Kensington v. Dollond*, 2 Beav. 1; 4 Myl. & Cr. 390;
Myl. & Keen, 181. *Scarborough v. Borman*, 1 Beav.
(*i*) *Tyler v. Lake*, 2 Russ. & 34; 4 Myl. & Cr. 377.
Myl. 183.

favour of married women, and having once established a trust for a woman's separate use, they have permitted such a trust to be made effectual by depriving the wife herself of the power of disposition (*n*). When the income of property is given to a woman's separate use, without power of anticipation, she is not thereby deprived of the power of alienation so long as she continues single (*o*). Previously to or in contemplation of marriage she may therefore make such disposition or settlement of such income as she may think proper. But should she marry without a settlement, the restraint on alienation will then attach, and so long as she remains under coverture she will have no further power than that of receiving the income as it grows due (*p*). On her widowhood her power of alienation will again revive (*q*), but will cease on her second marriage without having previously made any disposition (*r*), provided the restriction on alienation be not, by the terms of the gift, confined to her first marriage (*s*). The intention to restrain alienation ought always to be clearly expressed. A direction to pay the income of property into the hands of a married woman, and not otherwise, will not be sufficient to restrain her from disposing of her interest, the words being considered as intended only to exclude the marital claims of her husband (*t*). But if an intention can be collected from the terms of the instrument, not only to exclude the husband's claims, but also to prevent the wife from anticipating, such in-

(*n*) *Brandon v. Robinson*, 18 Ves. 434.

(*o*) *Woodmeston v. Walker*, 2 Russ. & Myl. 197; *Brown v. Pocock*, 2 Russ. & Myl. 210.

(*p*) *Tullet v. Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; 4 Myl. & Cr. 377.

(*q*) *Barton v. Briscoe*, Jacob, 603.

(*r*) *Tullet v. Armstrong*, ubi supra.

(*s*) *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149.

(*t*) *Acton v. White*, 1 Sim. & Stu. 429.

tention will prevail, although it may be expressed rather in popular than in strictly technical language (*u*).

Powers.

In addition to trusts for separate use, powers of appointment may, as we have seen (*x*), be given to married women independently of their husbands, by means of which they may be enabled to dispose of property without their husbands' concurrence (*y*); and any appointment under a general power may be made by a married woman in favor of her husband, as well as of any other person.

Separation.

Unhappy differences between husband and wife sometimes end in a separation. Such a state of things is not, however, encouraged by the law. A clause in a marriage settlement providing for the event of a separation, has been considered to be void (*z*); and so has a condition in a gift of personal estate to a woman living apart from her husband, that the gift shall cease in case she should cohabit with him (*a*). It is however clear, that a deed making provision for an immediate separation between husband and wife is not void for illegality (*b*). One of the usual provisions of a deed of separation is, a covenant on the part of some friend of the wife's to indemnify the husband against any debts she may incur whilst living apart. Such a covenant is a valuable consideration for any settlement which the husband may make for the benefit of his wife, and places such settlement on the same footing as any other

Covenant to indemnify against wife's debts.

(*u*) *Brown v. Bamford*, 1 Phil. 620; *Moore v. Moore*, 1 Coll. 54; *Harrop v. Howard*, 3 Hare, 624; *Harnett v. Macdougall*, 8 Beav. 187.

(*x*) *Ante*, p. 196.

(*y*) See Appendix C.

(*z*) *Cocksedge v. Cocksedge*, 11

Sim. 214; see also *Hindley v. Marquis of Westmeath*, 6 Barn. & Cres. 200.

(*a*) *Wren v. Bradley*, V. C. Knight Bruce, 12 Jurist, 168.

(*b*) *Jones v. Waite*, 4 Man. & Gr. 1104.

alienation made for valuable consideration (*c*). But if there be no such covenant, nor any other valuable consideration (*d*), a settlement made by a husband on separating from his wife, stands in the same position as any other voluntary deed (*e*); and, though binding on himself, may not be binding on his creditors (*f*). The circumstance of separation gives to the wife no further power of disposition over property than she possessed whilst living with her husband (*g*). Accordingly she will not, should she survive her husband, be bound by any disposition of her personal estate made on the separation, which her husband would have been unable to make, without her concurrence, had no separation taken place (*h*). If after separation the parties become reconciled (*i*), or if a restitution of conjugal rights be decreed by the ecclesiastical court (*k*), the provisions of the deed of separation will thenceforth become inoperative.

In the event of separation, the custody of the infant children belongs by law to the father as the natural guardian (*l*). And it has been questioned, whether he is competent to relinquish a duty thrown upon him by the law, and whether, therefore, a covenant on his part to give up the children to the care of their mother, be legal (*m*). If however the conduct of the father should be such that the children would be exposed to cruelty

Custody of infant children.

(*c*) *Stephens v. Olive*, 2 Bro. C. C. 90; *Worrall v. Jacob*, 2 Meriv. 256, 269.

(*d*) See *Wilson v. Wilson*, 14 Sim. 405.

(*e*) See *ante*, pp. 214, 215.

(*f*) *Fitzer v. Fitzer*, 2 Atk. 511; *Clough v. Lambert*, 10 Sim. 174.

(*g*) *Lord St. John v. Lady St. John*, 11 Ves. 531.

(*h*) *Stamper v. Barker*, 5 Madd. 157; *Slatter v. Slatter*, 1 Yo. & Col. 28.

(*i*) *Bateman v. Ross*, 1 Dow, 235, 245; *Lord St. John v. Lady St. John*, 11 Ves. 537; see however *Hulme v. Chitty*, 9 Beav. 137.

(*k*) *Fletcher v. Fletcher*, 2 Cox, 99.

(*l*) Co. Litt. 88 b, n. (12); *Rex v. Sherrington*, 3 Barn. & Adol. 714.

(*m*) *Lord St. John v. Lady St. John*, 11 Ves. 531; see however *Lecone v. Sheives*, 1 Vern. 442; *Colston v. Morris*, 6 Madd. 89.

or gross corruption of morals from being left in his custody, the law will deprive him of a charge for which he has shown himself totally unfit(*n*). And by a recent act of parliament(*o*), power is given to the judges of the Court of Chancery(*p*), upon the petition of the mother of any infant, being in the sole custody of the father or of any person by his authority, or of any guardian after the death of the father, to make order for the access of the petitioner to such infant, at such times and subject to such regulations as shall be deemed convenient and just; and if such infant shall be within the age of seven years, to make order that such infant shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as shall be deemed convenient and just. If adultery has been established against the mother, no order can be made in her favor under this act(*q*).

Alimony.

When a separation takes place through the misconduct of the husband, by a decree of the ecclesiastical court, a separate maintenance, under the name of *alimony*, is required to be paid to the wife by her husband(*r*). The allowance thus made is exclusively of ecclesiastical jurisdiction(*s*). If alimony be decreed and duly paid(*t*), or if the husband otherwise allow his wife a sufficient separate maintenance(*u*), he will not be liable for any debts she may incur. But if she receive no such allowance(*x*), and the separation be not

Liability to wife's debts for necessities.

(*n*) *Cruise v. Hunter*, 2 Bro. C. C. 499; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Rex v. Greenhill*, 4 Adol. & Ell. 624.

(*o*) Stat. 2 & 3 Vict. c. 54; *Ex parte Bartlett*, 2 Coll. 661.

(*p*) *In re Taylor*, 10 Sim. 291.

(*q*) Sect. 4.

(*r*) 2 Rop. Husb. and Wife, 209, note.

(*s*) *Vandergucht v. De Bla-*

quiere, 8 Sim. 315; 5 My. & Cr. 229, 241; *Stones v. Cooke*, 8 Sim. 321, note.

(*t*) *Willson v. Smyth*, 1 Barn. & Adol. 801; *Hunt v. De Blaquiere*, 5 Bing. 550.

(*u*) *Mizen v. Pick*, 3 Mee. & Wels. 481.

(*x*) *Kregan v. Smith*, 5 Barn. & Cress. 375.

occasioned by her own misconduct (*y*), her husband will still remain liable for all debts incurred by her for necessaries suitable to her station in life (*z*). For as the husband is bound to maintain his wife, she has, as we have seen, an implied authority, as his agent, to purchase all articles suitable for this purpose, with which he may have neglected to supply her (*a*).

A comparison of the laws of husband and wife relating to real estate, with those which affect personal property, will show a great discrepancy between them. Historically, no doubt, this discrepancy is easily accounted for; but practically, as things now exist, it is not so easy to give a satisfactory reason for the difference. Since the intended amendment of the law relating to dower, the wife's rights in her husband's real estate have, for the satisfaction of conveyancers, been reduced to as low a level as her rights in his personalty. But the husband's rights in his wife's property still materially vary, according as it may happen to be invested in real or in personal estate. If it consist of real estate, he has only a life interest as tenant by the curtesy, provided he has issue by his wife born alive, who might by possibility inherit as her heir (*b*). If it be personal estate, he has a right to appropriate to himself all that he can lay hands on. Again, the real estate of the wife is guarded from alienation by the most careful provisions. Formerly the fictitious and cumbersome machinery of a *fine* was requisite; and now every conveyance of her real estate must be not only signed by her, but also *acknowledged* by her before commissioners, apart from her husband, as her own act and deed (*c*). But the

Comparison of the law of husband and wife as to real and as to personal estate.

(*y*) *Todd v. Stokes*, 1 Ld. Raym. 444; *Etherington v. Parrot*, 2 Ld. Raym. 1006; *Morris v. Martin*, 1 Str. 647.

(*z*) 2 Rep. Husb. and Wife, 307;

Houlston v. Smyth, 3 Bing. 127.

(*a*) *Ante*, p. 280.

(*b*) See Principles of the Law of Real Property, 167.

(*c*) *Ibid.* 171.

assignment of her personal estate, if made at all, can only be made by her husband ; and her concurrence or objection is quite immaterial. When personal estate consists of mere moveable articles, the nature of the property no doubt affords a sufficient reason for the difference between the laws which dispose of it, and those which regulate estates in fixed and immovable landed property. But when personalty assumes the form of such solid investments as mortgages or consols, when it becomes like land disposable by deed rather than by delivery, the laws which affect it should rather depend on its present nature than on its past history. It seems hardly fair that a married woman should have no voice in the disposition of property of this kind belonging to herself. At the same time, the present system of taking her acknowledgment on a conveyance of her real estate is often found to be a burdensome expense, without any practical benefit. For if a husband can persuade his wife to sign a deed, he can easily prevail on her to make an acknowledgment before two commissioners, notwithstanding that during the two minutes which the transaction lasts she may remain "separate and apart" from him. If, whenever the wife's property of any kind should be alienated by deed, her signature were necessary, but her separate examination were dispensed with, the law both of personal and real estate would perhaps be improved. The Court of Chancery, by the establishment of trusts for separate use, and by giving the wife an equity to a settlement of part of her personal property when claimed through the medium of that court, has done much to mitigate the simple rigour of the common law. Trusts for separate use are now, after much wavering, firmly settled, it is to be hoped, into a system according both with the interests of the community and the general principles of the law. Such trusts, however, generally require to be established by deed or will, and are very seldom

Acknowledg-
ment by wife
on conveyance
of real estate.

implied. And the wife cannot assert her equity to a settlement without taking the serious step of making an application to the Court of Chancery. The theory of that court certainly is, that its assistance is free and open to everybody, and that those who neglect to avail themselves of its aid suffer by their own fault. Experience however is too apt to suggest that the remedy may sometimes prove worse than the disease.

PART V.

OF TITLE.



THE title to personal estate varies according as it may consist of money or negotiable securities, or of ordinary choses in possession, or of choses in action.

Money and negotiable securities,

And first, with regard to money or negotiable securities, no title at all is required to be shown by the payer in any *bonâ fide* transaction. Thus if a sovereign or a bank note be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. The reason of this rule is founded on the currency of the articles in question, and on the great inconvenience to trade and commerce which would ensue if the rule were otherwise (*a*). And the rule applies to all negotiable securities, that is, to all instruments the delivery of which passes the legal right to the property secured by them. Promissory notes and bills of exchange payable to bearer, or payable to order and indorsed in blank, are accordingly within the rule (*b*). But if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover such property, provided its identity can be ascertained (*c*).

(*a*) *Miller v. Race*, 1 Burr. 452; 1 Smith's Leading Cas. 250.

(*b*) *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, 2 Doug. 333; see *ante*, p. 72.

(*c*) *Clarke v. Shee*, Cowp. 197; *Foster v. Pearson*, 1 C. M. & R. 819; S. C. 5 Tyrw. 255; *Goodman v. Harvey*, 4 Ad. & El. 870.

With regard to ordinary choses in possession, a valid title to them is generally obtained by a purchase in an open market, or *market overt*, although no property may have been possessed by the vendor (*d*). And every shop in the city of London, where goods are openly sold, is considered as a market overt within this rule, for such things as by the trade of the owner are put there for sale (*e*). But the shops at the west end of the town do not appear to possess this privilege. If the sale is not made in market overt, the purchaser, though he purchase *bonâ fide*, acquires no further property in the article sold than was possessed by the vendor (*f*). If therefore a writ of execution should be actually in the hands of the sheriff on a judgment against the vendor, the goods, if not sold in market overt, will be subject, in the hands of the purchaser, to the sheriff's right to seize, in the same manner as if they had remained in the hands of the vendor (*g*). So if the goods have been stolen, a *bonâ fide* purchaser, who has not bought them in market overt, will be bound to restore them to the true owner (*h*); whereas, in either of the above cases, a sale in market overt would have given the purchaser a valid title. There is one case, however, in which even a sale in market overt will not protect a purchaser, namely, the case of the goods having been stolen, and the true owner prosecuting the thief and obtaining his conviction. In this case the property in the goods, wherever they may be, vests, on the conviction, in the true owner; and the only exception allowed is, where the article stolen is some valuable security, which shall have been paid or discharged *bonâ fide* by the person

Sale of chattels
in market overt.

Stolen goods.

(*d*) 2 Black. Com. 449.

& El. 495; *White v. Spettiguc*, 13

(*e*) *The case of Market Overt*,

Mee. & W. 603.

5 Rep. 83 b; *Lyons v. De Pass*,
11 Ad. & El. 326.

(*g*) *Samuel v. Duke*, 3 Mee. &
W. 622; see *ante*, p. 46.

(*f*) *Peer v. Humphrey*, 2 Ad.

(*h*) *White v. Spettiguc*, 13 Mee.
& W. 603.

liable, or, being a negotiable instrument, shall have been *bonâ fide* transferred or delivered for a just and valuable consideration, without any notice, and without any reasonable cause to suspect that the same had been obtained by any felony or misdemeanor (*i*). If a person suffer the loss of his goods by theft, he cannot by any civil action recover them from the felon (*k*). To do this, he is bound to suffer the further loss of time or money incurred in a prosecution. If he should succeed in obtaining a conviction, he is then rewarded for his good fortune by a restitution of his property, whether in the hands of the felon himself, or of any innocent purchaser who may have chanced to buy them, although in open market. Such is the application made by the law of the righteous principle of restitution.

Horses.

With regard to horses, a sale in market overt will not confer on the purchaser any further title than is possessed by the vendor, unless the sale be made according to the directions of certain statutes (*l*); and even then the true owner may at any time within six months after his horse has been stolen, recover his property on tender to the person in possession of the price he *bonâ fide* paid for it (*m*).

Factors and agents.

A factor or agent in the possession of goods could not, by the common law, give any further title to the goods than he was authorized to do by his principal, either expressly or by implication arising from the usual course of his employment (*n*). And when one man is appointed the agent of another for any particular pur-

Power of attorney.

(*i*) Stat. 7 & 8 Geo. IV. c. 29. 31 Eliz. c. 12; 2 Black. Com. s. 57. 450.

(*k*) *Stone v. Marsh*, 6 Barn. & (m) Stat. 31 Eliz. c. 12, s. 4.

Cress. 551, 564; 2 Wms. Saund. (n) *Pickering v. Busk*, 15 East, 47 b, n. (*p*). 38, 43.

(*l*) Stats. 2 & 3 P. & M. c. 7;

pose by power of attorney, his authority must still be strictly pursued, otherwise his principal will not be bound (*o*). But by modern acts of parliament a more extended authority has, for the convenience of commerce, been conferred on factors and agents (*p*). The provisions of these acts are too long to be here inserted; but their general effect is to render valid sales and pledges made by factors or agents, notwithstanding any notice of the fact of their being merely factors or agents, provided the party dealing with them have no notice that they are acting without authority or *malâ fide*.

In ancient times the sale of lands was usually accom- Warranty.
panied by a warranty of their title; and some words, such as the word *give* in a feoffment, had the effect of an implied warranty, when none was expressed (*q*). When warranties fell into disuse, the purchasers of lands acquired a right to covenants for the title, varying in their stringency according to the nature of the title of the vendor (*r*). No warranty however arises from the mere sale of goods, unless it be expressly given, or implied from the custom of the trade or the nature of the contract (*s*). Every affirmation made by the vendor at the time of sale respecting the goods is an express warranty, if it appear to have been so intended (*t*). And if the vendor state that the goods are his own, this amounts to a warranty of his title (*u*); but if the contract for sale be in writing, the warranty must

(*o*) *Attwood v. Munnings*, 7 Mee. & W. 611.
Barn. & Cress. 278.

(*p*) Stat. 4 Geo. IV. c. 83; 6 1 Bing. 344; *Sheppard v. Kain*,
Geo. IV. c. 94; 5 & 6 Vict. c. 39. 5 Barn. & Ald. 210; *Power v.*

(*q*) See Principles of the Law of Real Property, 314. *Barham*, 4 Ad. & Ell. 473.

(*r*) *Ibid.* 348. (*u*) *Furniss v. Leicester*, Cro.
Jac. 471; *Medina v. Stoughton*,

(*s*) *Chanter v. Hopkins*, 1 Mee. 1 Salk. 219.
& W. 399; *Burnby v. Rollett*, 16

be in writing also (*x*). And a warranty made subsequently to the sale is void for want of consideration (*y*). Contracts made in the course of any trade are always subject to the custom of that trade; and if by the custom of the trade a warranty is implied in any contract, the vendor will be bound by it, in the same manner as if he had given an express contract (*z*). So the nature of the contract may be such as to imply a warranty. Thus a contract to furnish goods for a particular purpose, contains an implied warranty that they are fit for that purpose (*a*); and a contract to furnish manufactured goods implies a warranty that they shall be of a merchantable quality (*b*).

Statute of Li-
mitations. If goods and chattels should have come into the possession of persons having no title to them, such persons will, in course of time, be quieted in their enjoyment by virtue of the Statute of Limitations (*c*). By this statute all actions of trespass, detinue and replevin for goods or cattle must be brought within *six* years next after the cause of such action (*d*); but if the person entitled to any such action be under age, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, such person shall be at liberty to bring the same action within *six* years after the disability is removed (*e*).

Disabilities.

Statutes of Li-
mitation as to
choses in ac-
tion. Choses in action, whether legal or equitable, differ from choses in possession in this, that the title to them is endangered rather than strengthened by the Statutes of Limitation. This difference arises from the nature of

(*x*) *Pickering v. Dowson*, 4 533; *Brown v. Edgington*, 2 Man. & Gr. 279.

(*y*) *Finch*, L. 189; see *ante*, p. 62. (*b*) *Laing v. Fidgeon*, 6 Taunt. 108.

(*z*) *Jones v. Bowden*, 4 Taunt. 847. (*c*) Stat. 21 Jac. I. c. 16.

(*d*) Sect. 3. (*e*) Sect. 7.

the property. Goods and chattels may exist without any owner; but if there cease to be a person entitled to a debt, the debt itself ceases to exist. The time within which actions or suits may be brought for the recovery of choses in action varies according to the nature of the security. The law on this subject has been rendered somewhat difficult by two different acts of parliament (*f*) varying from each other, each passed the same session of parliament, and each intended to amend the law. The following, however, appear to be the distinctions. If the chose in action be money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any real estate at law or in equity, or any legacy (*g*), no action or suit can be brought to recover the same but within *twenty years* next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent (*h*), to the person entitled thereto or his agent; and in such case no such action or suit shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given (*i*). If the chose in action be rent due upon an indenture of demise, or money secured by bond or other specialty, or by a recognizance, an action must also be brought within *twenty years* after the cause of such action (*k*), or within twenty years after the removal of any of the disabilities of infancy, coverture,

Mortgages,
judgments and
legacies.

*This must be
repaid in equity*

Rent secured
by indenture,
and money se-
cured by bond,
specialty or re-
cognizance.

(*f*) Stat. 3 & 4 Will. IV. cc. 27, 42. 9 Sim. 219.

(*i*) Stat. 3 & 4 Will. IV. c. 27,

(*g*) *Sheppard v. Duke*, 9 Sim. s. 40.

567. (*k*) Stat. 3 & 4 Will. IV. c. 42,

(*h*) *Lord St. John v. Boughton*, s. 3.

accruing
~~to~~

lunacy or absence beyond seas (*l*). And if any person against whom there is any such cause of action shall be beyond the seas at the time of such cause of action accrued, the person entitled to any such cause of action may bring the same against him within twenty years after his return (*m*). And if any acknowledgment shall have been made, either by writing signed by the party liable, or his agent, or by part payment or part satisfaction on account of any principal or interest then due, the person entitled may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment, or within twenty years after any of the above-mentioned disabilities shall have ceased, or the party liable shall have returned beyond the seas, as the case may be (*n*).

Arrears of
 dower.

If the chose in action consist of arrears of dower, neither such arrears nor damages on account thereof can be recovered or obtained by any action or suit for a longer period than *six years* next before the commencement of such action or suit (*o*). Arrears of rent or of interest in respect of any sum of money charged upon or payable out of any real estate (unless secured to the claimant (*p*) by indenture of demise (*q*), or by bond or other specialty (*r*)), or in respect of any legacy) can be recovered only within *six years* next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (*s*). But

Arrears of rent
 and interest,
 not secured by
 indenture, bond
 or specialty.

- (*l*) Sect. 4.
 (*m*) *Ibid*.
 (*n*) Sect. 5.
 (*o*) Stat. 3 & 4 Will. IV. c. 27,
 s. 41.
 (*p*) *Hughes v. Kelly*, 3 Dru.
 & Warren, 482.
 (*q*) *Paget v. Foley*, 2 New Ca.
 679.

- (*r*) *Du Vigier v. Lee*, 2 Hare,
 326, 336; *Sims v. Thomas*, 12
 Ad. & Ell. 536.
 (*s*) Stat. 3 & 4 Will. IV. c. 27,
 s. 42; *Hodges v. Croydon Canal*
Company, 3 Beav. 86; *Francis v.*
Grover, 5 Hare, 39.

where a mortgagee or other incumbrancer shall have been in possession of any real estate within one year next before the action or suit of a subsequent mortgagee or incumbrancer, the latter may recover the arrears of interest which may have become due to him during the whole time that the prior mortgagee or incumbrancer was in possession (*t*). If the chose in action consist of a simple contract debt, it must be sued for within *six years* next after the cause of action, or within *six years* next after the removal of any of the disabilities of infancy, coverture, lunacy, imprisonment or absence beyond seas (*u*). And no acknowledgment or promise by words only to pay such debt shall be deemed sufficient evidence of a new or continuing contract to take the case out of the operation of the statute, unless such acknowledgment or promise shall be made in writing, signed by the party chargeable thereby (*x*). Actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, must also be brought within *six years* after the cause of action, with a similar saving in respect of disabilities to that applicable in the case of actions on indentures of demise, bonds or other specialties (*y*). And actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force, must be brought within *two years* after the cause of such actions, with the like saving in respect of disabilities, unless the time for bringing such action is or shall be by any statute specially limited (*z*).

Simple contract debts.

Awards, fines for copyholds, &c.

Penalties, &c. given to the party grieved.

(*t*) Stat. 3 & 4 Will. IV. c. 27, see *ante*, pp. 65, 70.
s. 42.

(*y*) Stat. 3 & 4 Will. IV. c. 42,

(*u*) Stat. 21 Jac. I. c. 16, ss. ss. 3, 4; see *ante*, p. 295.

3, 7. (*z*) Stat. 3 & 4 Will. IV. c. 42,

(*v*) Stat. 9 Geo. IV. c. 14, s. 1; ss. 3, 4.

Death of creditor.

Death of debtor.

Executor or administrator not bound to plead the statute.

Charge of real estate for payment of debts.

When a cause of action accrues to a person in his lifetime, the time limited by the Statutes of Limitation will run on after his decease from the period that the cause of action accrued, and will not be reckoned from the time that administration was taken out to his effects (*a*). But if the cause of action accrue after the death of the party, the time limited by the statute will run only from the grant of the letters of administration (*b*). On the other hand, the death of the debtor and the absence of any personal representative to his effects, will not prevent the time limited by the statute from continuing to run on. For if there be once a cause of action, a plaintiff that can sue, and a defendant that can be sued in England, the time limited by the statute will begin to run, and will not be stopped by the decease of either party (*c*). An executor or administrator is not, however, bound to plead the Statute of Limitations to any debt or demand, but may, if he please, pay the same notwithstanding the time limited by the statute may have expired (*d*). But if the estate be administered in the Court of Chancery, any party to the suit is competent to take the objection, although the executor may not have insisted on it (*e*).

Notwithstanding the period of six years limited for the payment of simple contract debts, the debtor may, by charging his real estate by his will with the payment of his debts, prevent the operation of the statute on all such debts as have not been barred by the statute in his lifetime (*f*). Real estate, it will be remembered, was

(*a*) 2 Wms. Saund. 63 k.

526; *Ex parte Dewdney*, 15 Ves.

(*b*) *Murray v. East India Company*, 5 Barn. & Ald. 204; *Perry v. Jenkins*, 1 Mylne & Cr. 118.

498.

(*c*) *Shewen v. Vanderhorst*, 1 Russ. & M. 347; 2 Russ. & M. 75.

(*c*) *Rhodes v. Smethurst*, 6 Me. & Wels. 351; *Freake v. Crangfeldt*, 3 Mylne & Cr. 499.

(*f*) *Burke v. Jones*, 2 Ves. & Beames, 275; *Hughes v. Wynne*, Turn. & Russ. 307; *Crallan v.*

(*d*) *Norton v. Frecker*, 1 Atk.

Oulton, 3 Beav. 1.

not formerly liable to the payment of any debts which were not secured by specialty binding the heirs (*g*); and the alteration, which in this respect has been made in the law, affects only such real estates as have not been charged by the deceased with the payment of his debts. The creditors therefore in whose favour the charge is made, acquire as before the alteration, the character of *cestui que trusts*; and in equity they will not be allowed to lose their debts, because they do not go to law to enforce payment when they have a trustee to pay them (*h*). But as personal estate has always been primarily liable to the payment of all debts, a trust created by a testator for the payment of his debts out of his personal estate will not prevent the operation of the statute (*i*).

When the dividends upon any stock transferable at the Bank of England have not been claimed for ten years, such stock, together with the unclaimed dividends, is transferred to the account of the commissioners for the reduction of the national debt (*k*); and such dividends, together with all the future dividends on the stock, are invested by the commissioners in the purchase of like stock, so as to accumulate (*l*). And the governor or deputy governor of the bank for the time being may order the transfer of such stock and the payment of the dividends to any person showing, to his satisfaction, a right thereto; but in case such governor or deputy governor shall not be satisfied of the justice or legality of the claim, an order for transfer and payment may be obtained from the Court of Chancery by

(*g*) See Principles of the Law of Real Property, 57; *ante*, p. 92.

(*h*) Turn. & Russ. 309.

(*i*) *Scott v. Jones*, 4 Cl. & Fin. 382; *Freaker v. Cranefeldt*, 3 My.

& Cr. 499.

(*k*) Stat. 56 Geo. III. c. 60; 8 & 9 Vict. c. 62.

(*l*) Stat. 56 Geo. III. c. 60, s. 4.

Unclaimed dividends.

petition in a summary way stating and verifying the claim (*m*). But no such transfer of stock or payment of dividends, exceeding the sum of 20*l.*, can be made until three calendar months after the application, nor until notice has been advertised in one or more newspapers circulating in London and elsewhere, as the governor and company of the bank shall think fit; which notice must state the name, description and condition of the person in whose name the unclaimed stock or dividends stood when transferred to the commissioners, and the amount thereof, and the name of the claimant, and the time at which the retransfer or payment will be made if no other claimant shall sooner appear and make out his claim. And when the stock or dividends are directed to be transferred or paid by any order of the Court of Chancery, the notice must also state the purport or effect of such order (*n*); and any person may at any time before the actual retransfer of the stock, or payment of the dividends to any such claimant, apply to the Court of Chancery by motion or petition to rescind, alter, or vary any order made for such transfer or payment (*o*).

Notice of assignment of choses in action.

When a chose in action, whether legal or equitable, is transferred from one person to another, notice of the assignment should be given by the transferee to the person liable to the action at law or suit in equity, the right to bring which is the subject of the transfer (*p*). Thus if a debt be assigned, notice of the assignment should be given to the debtor. If the subject of the assignment be the right to stock standing in the name of a trustee, notice of the assignment should be given to such trustee. Until such notice be given, it is evident that the debtor may innocently pay the debt, or the

(*m*) See. 5; *Ex parte Ram*, 3 My. & Craig, 25.
 (*n*) Stat. 8 & 9 Vict. c. 62, s. 2.
 (*o*) Sect. 3.
 (*p*) *Dearle v. Hull*, *Lov- ridge v. Cooper*, 3 Russ. 1.

trustee transfer the stock to the transferor; or the transferor may fraudulently transfer his right over again to a third person. The transferee therefore, until he has given notice to the party liable, has not done all that lies in his power to perfect his title. The chose in action still remains the apparent property of the transferor, and in the event of his bankruptcy will pass to his assignees as property in his order and disposition, with the consent of the true owner thereof (*q*). The importance of giving notice suggests the precaution that every person about to accept an assignment of a chose in action, should inquire of the person liable to the action or suit, whether he has had notice of any prior assignment. And if there be two or more persons liable, inquiry should be made of every one of them; for notice by a prior assignee to any one of them would be equivalent to notice to them all (*r*). It is also advisable that a written answer should be obtained to every such inquiry, in order that if the assignee shall be misled by a false answer, he may be enabled to recover damages for the misrepresentation. For it has been doubted whether the answer to such an inquiry be not a representation concerning the ability of the intended assignor within the meaning of Lord Tenterden's Act, which requires that all such representations be made in writing signed by the party to be charged therewith (*s*). The inquiry, however, thus recommended will not of itself strengthen the title of the assignee, further than by assuring him that no previous assignment has been made. In order to obtain a good title, he must himself give notice to the person or to one of the persons liable to the debt or demand assigned to him. When this has

Bankruptcy of transferor.

Inquiry as to prior assignments.

(*q*) *Ex parte Munro*, Buck, M. 231; *Mene v. Bell*, 1 Hare, 300; *Williams v. Thorpe*, 2 Sim. 73, 87.

257; *Thompson v. Spicers*, 13 Sim. 469; see *ante*, p. 47. (*s*) *Lyde v. Barnard*, 1 Mees. & Wels. 101; *Swann v. Phillips*, 8 Ad. & El. 457; see *ante*, p. 72.

(*r*) *Smith v. Smith*, 2 Cr. &

Stop order.

Distringas.

been done his title will be secure, and will prevail over that of any unknown prior assignee who may have omitted to give such notice (*t*). If the property consist of money or stock standing in the name of the account-ant-general of the Court of Chancery, or of securities in his possession (*u*), an order of the court should be obtained on petition (*x*), restraining transfer or payment without notice to the assignee. This order is called a stop order, and will have the same effect as notice of assignment given to any private debtor (*y*). If the property be stock standing in the name of a trustee, who has died without any administration having been taken out to his effects, a *distringas* obtained by the assignee to restrain the transfer of the stock will confer on him the same priority as notice to the trustee would have done had he been living (*z*). Where the property consists of a policy of assurance, or of shares in a joint stock company, notice of the transfer should be given to the office of the company (*a*).

Title through deeds, wills, &c.

Abstract of title.

The title to personal property sometimes depends upon deeds, wills, or other documents of title of the like nature, and cannot be shown without their production. Thus a reversionary interest in money in the funds, settled by deed or will, may be mortgaged and sold again and again before it becomes an interest in possession. In these cases the purchaser is entitled to an abstract of the deeds, wills, &c. which compose the title, in the same

(*t*) *Dearle v. Hall, Love-ridge v. Cooper*, 1 Russ. 1.

(*u*) *Williams v. Symonds*, 9 Beav. 523.

(*x*) To be served only on the parties interested in the fund assigned; General Order, 3rd April, 1811; *Glazbrook v. Gillatt*, 9 Beav. 611.

(*y*) *Greening v. Beckford*, 5

Sim. 195.

(*z*) *Elty v. Bridges*, 2 Younge & Coll. N. C. 486; see *ante*, p. 154.

(*a*) *Williams v. Thorpe*, 2 Sim. 257; *Thompson v. Spiers*, 13 Sim. 469; *West v. Reid*, 2 Hare, 249; *Martin v. Sedgwick*, 9 Beav. 333; *Powles v. Page*, 3 C. B. 16.

manner as if the subject of the contract had been real estate ; and the original deeds, and the probates or office copies of the wills, must also in like manner be produced for the verification of the abstract (*b*). The purchaser is also entitled either to the possession of the deeds, or, if this cannot be had, to attested copies of them, and a covenant for their production, at the expense of the vendor (*c*). And when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of real estate (*d*).

Covenants for title.

It has been recently decided that the vendor of shares in certain joint stock mining companies is bound to furnish the purchaser with the title to the mines (*e*). The effect of this decision will be to render such shares unmarketable, unless the contract contain a stipulation for the immediate acceptance of the shares by the purchaser. For the shareholders practically know nothing of the title to the property held by the company ; and, if they could produce it, it would probably not be such as to satisfy an unwilling purchaser. The decision, however, appears to be founded on a false analogy to the title to land. The purchaser of land can require, without any express stipulation, a sixty years' title (*f*). Why ? Because the vendor professes to sell an unincumbered estate in fee simple ; and the powers of disposition and settlement enjoyed over real estate are so ample, that nothing less than a sixty years' history is sufficient to satisfy the purchaser that the vendor really has what he professes to sell. But the vendor of a share in a joint stock company makes no such profession.

Title to shares.

(*b*) See Principles of the Law of Real Property, 349 ; *Hobson v. Bell*, 2 Beav. 17.

(*c*) *Ibid.* 354, 356.

(*d*) *Ibid.* 348.

(*e*) *Curling v. Flight*, V. C. Wigram, 12 Jur. 91.

(*f*) See Principles of the Law of Real Property, 348.

He professes merely to sell a certain share in a certain undertaking. All, therefore, that he should be required to prove appears to be, first, that there is such an undertaking, and, secondly, that he holds a share in it. The first requisition is readily satisfied, and the second will be apparent from any admission or evidence which is binding on the other shareholders. For if they admit that the vendor owns a share, and no obstacle is offered to its transfer to the purchaser, he will be placed in undisputed possession of the whole subject of his contract.

Comparison of
the title to real
and personal
estate.

From what has been said it will appear that the title to personal property is far more simple than that to real estate. And amongst the plans which have appeared for the amendment of the law, has been one for adapting the machinery of the funds to the transfer of landed property. Upon consideration, however, it will perhaps appear that the greater complexity of the title to lands arises partly from the nature of the property, and partly from the more full power of disposition to which lands are subject. Lands, unlike stock, may be converted from arable to pasture, may be cut up into roads, canals, or railways, may be sold by the foot for building purposes, may be let upon lease for terms absolute or determinable, may be held for life, or in tail, as well as in fee, and may be disposed of by contingent remainders, shifting uses, and executory devises, without the intervention of any trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees in whom a great degree of personal confidence must necessarily be placed; but when so settled, the title to it is sometimes as long and intricate as that to real estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition, the title to real estate might doubtless be rendered as simple as that to personal property. To the latter alter-

native, however, few, if any, would be inclined to submit. Whilst, therefore, much might be done to simplify and improve our laws of property by an assimilation of the rules of real and personal estate, where the history of each forms the only ground of variety, care should be taken to preserve untouched such distinctions as are founded on the broad basis of a practical difference.

APPENDIX (A.)

Referred to p. 125.



THE following are some of the measures proposed by the Metropolitan Committee, appointed at public meetings of merchants, bankers, and traders of the city of London, for the purpose of obtaining an amendment of the law of bankruptcy and insolvency.

To restore the law of arrest for debt upon mesne process, with ample precautions against the abuses which prevailed under the old law.

For this purpose, the committee adopt the provisions of a bill brought into the House of Commons by Mr. Warburton, in 1846, under which the arrest would be effected only by the order of a commissioner of the Court of Bankruptcy, to be obtained upon satisfactory proof of the existence of a *bond fide* debt of £20 or upwards, and of payment having been twice demanded within a limited period previously to the application for leave to arrest.

Immediately upon arrest, the debtor would be brought before the commissioner, who would be empowered, after examination of the parties, to discharge the debtor from custody, either unconditionally, or upon payment of a sum of money into court, or upon his finding bail to such amount as the commissioner might direct. He would also be entitled to his release upon his signing (if he should be liable to the bankrupt laws) a declaration of insolvency, or petitioning the Court of Insolvent Debtors for relief.

To give to the commissioners absolute discretion at any time to refuse or withdraw the protection which every bank-

rupt now obtains as a matter of course immediately upon his surrendering under the fiat.

To render the refusal or withdrawal of protection *compulsory* upon the court, when the bankrupt shall fail to show that his bankruptcy has arisen otherwise than from fraud, gambling, wilful misconduct, or extravagance; or in case of concealment or making away with his property or books, contracting debts without reasonable expectation of ability to pay them, and for other offences which are now by the present bankrupt law punishable as felonies or misdemeanors.

To give to the creditors who have proved their debts, and to the assignees for the whole amount of debts admitted to be due by the bankrupt, the power of judgment creditors to take the person of the bankrupt in execution *when thus deprived of protection*; and, in case of such execution, the bankrupt shall not be entitled to his release *for a period not exceeding three years*, (the maximum period of remand possessed by the Insolvent Debtors Court,) except by order of the commissioner who withdrew the protection.

To throw the expense of criminal proceedings against fraudulent bankrupts on the country, instead of on the estate. It is manifestly unjust that the creditors, already injured by the loss of their property, should be called upon to pay the expenses, generally heavy, of a criminal prosecution, especially as in such cases there is little or no dividend for them. The practical operation of the present system is, that indictments are scarcely ever resorted to, and that the rogue escapes the punishment he deserves.

To simplify the notice and affidavit preliminary to obtaining the summons of a debtor before the Court of Bankruptcy; to facilitate the service of both the notice and summons, and to require upon the debtor's appearance thereupon additional evidence of having a good defence to the claim *beyond his own affidavit*. It is also proposed to require security by bond, with sureties, for the protection of his property during the fourteen days interval allowed between the appearance upon the sum-

mons and the act of bankruptcy, and in default of such security, or upon the non-appearance of the debtor on the summons, to empower a person to be named by the court to take charge of his property as the court should direct, until he can be made bankrupt.

To abolish the fiat, and to give to the Court of Bankruptcy original jurisdiction to declare a party bankrupt upon proof of the present requisites, viz. the petitioning creditor's debt, and the trading, and act of bankruptcy by the debtor.

This was recommended by the Report of the Parliamentary Commissioners in the year 1840.

APPENDIX (B.)

Referred to p. 171.

*Form of Letters Patent.*Recital of
petition.

VICTORIA by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith to all to whom these presents shall come greeting WHEREAS A. B. of — hath by his petition humbly represented unto us that in consequence of discoveries made by himself and communications made to him by foreigners residing abroad he is in possession of certain improvements in (*here state the title of the invention*) that the same are new in this kingdom and have never been practised herein by any other person or persons whomsoever to his knowledge or belief the petitioner therefore most humbly prayed that we would be graciously pleased to grant unto him his executors administrators and assigns our Royal Letters Patent under the great seal of our United Kingdom of Great Britain and Ireland for the sole use benefit and advantage of the said invention within England Wales and the town of Berwick-upon-Tweed and also in the islands of Guernsey Jersey Alderney Sark and Man and in all our colonies and plantations abroad for the term of fourteen years pursuant to the statute in that case made and provided And we being willing to give encouragement to all arts and inventions which may be for the public good are graciously pleased to condescend to the petitioner's request

KNOW YE THEREFORE that we of our especial grace certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant unto the said A. B. his executors administrators and assigns our especial license full power sole privilege and authority that he the said A. B. his executors administrators and assigns and every of them by himself and themselves or

Grant.

by his and their deputy or deputies servants or agents or such others as he the said A. B. his executors administrators and assigns shall at any time agree with and no others from time to time and at all times hereafter during the term of years herein expressed shall and lawfully may make use exercise and vend his said invention within that part of our United Kingdom of Great Britain and Ireland called England our dominion of Wales and town of Berwick-upon-Tweed and also in the islands of Jersey Guernsey Alderney Sark and Man and in all our colonies and plantations abroad in such manner as to him the said A. B. his executors administrators and assigns or any of them shall in his or their discretion seem meet And that he the said A. B. his executors administrators and assigns shall and lawfully may have and enjoy the whole profit benefit commodity and advantage from time to time coming growing accruing and arising by reason of the said invention for and during the term of years herein mentioned To HAVE HOLD exercise and enjoy the said license powers privileges and advantages hereinbefore granted or mentioned to be granted unto the said A. B. his executors administrators and assigns for and during and unto the full end and term of fourteen years from the date of these presents next and immediately ensuing and fully to be complete and ended according to the statute in such case made and provided AND to the end that he the said A. B. his executors administrators and assigns and every of them may have and enjoy the full benefit and the sole use and exercise of the said invention according to our gracious intention hereinbefore declared WE do by these presents for us our heirs and successors require and strictly command all and every person and persons bodies politic and corporate and all other our subjects whatsoever of what estate quality degree name or condition soever they be within that said part of the United Kingdom of Great Britain and Ireland called England our dominion of Wales and town of Berwick-upon-Tweed and also in the islands of Guernsey Jersey Alderney Sark and Man and in all our colonies and plantations abroad aforesaid that neither they nor any of them at any time during the continuance of the said term of fourteen years hereby granted either directly or indirectly do make use or put in practice the

Habendum.

Command not to infringe patent.

Without license
of patentee.

Command not
to hinder pa-
tentee.

Proviso to be
void if contrary
to law or not
new.

said invention or any part of the same so attained unto by the said A. B. as aforesaid nor in anywise counterfeit imitate or resemble the same nor shall make or cause to be made any addition thereunto or subtraction from the same whereby to pretend himself or themselves the inventor or inventors deviser or devisors thereof without the license consent or agreement of the said A. B. his executors administrators and assigns in writing under his or their hands and seals first had and obtained in that behalf *(a)* upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command and further to be answerable to the said A. B. his executors administrators and assigns according to law for his and their damages thereby occasioned AND MOREOVER we do by these presents for us our heirs and successors will and command all and singular the justices of the peace mayors sheriffs bailiffs constables headboroughs and all other officers and ministers whatsoever of us our heirs and successors for the time being that they or any of them do not nor shall at any time hereafter during the said term hereby granted in anywise molest trouble or hinder the said A. B. his executors administrators or assigns or any of them or his or their deputies servants or agents in or about the due and lawful use or exercise of the aforesaid invention or any thing relating thereto PROVIDED ALWAYS and these our letters-patent are and shall be upon this condition that if at any time during the said term hereby granted it shall be made appear to us our heirs or successors or any six or more of our or their privy council that this our grant is contrary to law or prejudicial or inconvenient to our subjects in general or that the said invention is not a new invention as to the public use and exercise thereof in that said part of our United Kingdom of Great Britain and Ireland called England our dominion of Wales and town of Berwick-upon-Tweed and also in the islands of Guernsey Jersey Alderney Sark and Man and in all our colonies and plantations abroad aforesaid or not first introduced therein *(b)* by the said A. B. as aforesaid then upon signification thereof to be made by us our heirs or successors

(a) See *ante*, p. 177.

(b) In case the patent be for an invention not communicated from

abroad then this clause runs as follows:—"or not invented or found out by the said," &c.

under our or their signet or privy seal or by the lords of our or their privy council or any six or more of them under their hands these our letters-patent shall forthwith cease determine and be utterly void to all intents and purposes PROVIDED ALSO that these our letters-patent and any thing hereinbefore contained shall not extend or be construed to extend to give privilege unto the said A. B. his executors administrators or assigns or any of them to use or imitate any invention or work whatsoever which hath heretofore been invented or found out by any other of our subjects whatsoever and publicly used and exercised in that said part of our United Kingdom of Great Britain and Ireland called England our dominion of Wales or town of Berwick-upon-Tweed or in the islands of Guernsey Jersey Alderney Sark or Man or in our colonies and plantations abroad aforesaid unto whom our like letters-patent or privileges have been already granted for the sole use exercise and benefit thereof it being our will and pleasure that the said A. B. his executors administrators and assigns and all and every other person and persons to whom like letters-patent or privileges have been already granted as aforesaid shall distinctly use and practise their several inventions by them invented or found out according to the true intent and meaning of the said respective letters-patent and of these presents PROVIDED LIKEWISE nevertheless and these our letters-patent are upon this condition that if at any time hereafter these our letters-patent or the liberties and privileges hereby by us granted shall become vested in or in trust for more than the number of twelve persons or their representatives at any one time as partners dividing or entitled to divide the benefit or profits obtained by reason of these our letters-patent reckoning executors or administrators as and for the single person whom they represent as to such interest as they are or shall be entitled to in right of their testator or intestate (c) AND ALSO if the said A. B. shall not particularly describe and ascertain the nature of the said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and cause the same to be enrolled in our High Court of Chancery within — calendar months (d)

Not to prejudice prior patents.

To be void if vested in more than twelve persons,

and if inventor do not enroll specification,

(c) See *ante*, p. 175.

(d) See *ante*, pp. 174, 177.

and if inventor
do not supply
the crown.

next and immediately after the date of these letters-patent AND ALSO that if the said A. B. his executors administrators or assigns shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same be required in such manner at such times and at and upon such reasonable price and terms as shall be settled for that purpose by the said officers or commissioners so requiring the same then these our letters-patent and all liberties and advantages whatsoever hereby granted shall utterly cease determine and become void anything hereinbefore contained to the contrary thereof in anywise notwithstanding PROVIDED that nothing herein contained shall prevent the granting of licenses in such manner and for such consideration as they may by law be granted (*e*) AND lastly we do by these presents for us our heirs and successors grant unto the said A. B. his executors administrators and assigns that these our letters-patent or the enrolment or exemplification thereof shall be in and by all things good firm valid sufficient and effectual in the law according to the true intent and meaning thereof and shall be taken construed and adjudged in the most favourable and beneficial sense for the best advantage of the said A. B. his executors administrators and assigns as well in all our courts of record as elsewhere and by all and singular the officers and ministers whatsoever of us our heirs and successors in that part of our said United Kingdom of Great Britain and Ireland called England our dominion of Wales and town of Berwick-upon-Tweed and also in the islands of Guernsey Jersey Alderney Sark and Man and in all our colonies and plantations abroad aforesaid and amongst all and every the subjects of us our heirs and successors whatsoever and wheresoever notwithstanding the not full and certain describing the nature or quality of the said invention or of the materials thereto conducing and belonging In witness whereof we have caused our letters to be made patent Witness ourself at Westminster this — day of — in the — year of our reign.

By writ of Privy Seal.

(*e*) See *ante*, p. 176.

APPENDIX (C.)

Referred to pp. 189, 209, 212.



*Marriage Settlement of a Share of a Testator's Residuary
Personal Estate and of Money in the Funds upon the
usual Trusts.*

THIS INDENTURE made the — day of — 1848 Between Charles Catchpole of King Street in the city of London gentleman of the first part Grace Gurney of Harley Street in the county of Middlesex spinster of the second part and Henry Hunter of Brixton in the county of Surrey Esquire John James of Lincoln's Inn in the county of Middlesex Esquire and Leonard Lambert of Brighton in the county of Sussex Esquire of the third part WHEREAS a marriage has been agreed upon and is intended to be shortly solemnized between the said Charles Catchpole and Grace Gurney AND WHEREAS under and by virtue of the last will and testament of John Gurney late of Harley Street aforesaid Esquire deceased which said will bears date on or about the ninth day of January 1840 and was proved in the Prerogative Court of the Archbishop of Canterbury (a) on or about the twelfth day of March 1840 the said Grace Gurney is now entitled to one equal undivided fourth part or share or some other part or share of the residuary personal estate of the said testator or the stocks funds or securities in or upon which the same is or may be invested AND WHEREAS the said Grace Gurney is possessed of the sum of £5000 £3 per cent. consolidated bank annuities which said sum was lately standing in her own name in the books of the governor and company of the Bank of England AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said Grace Gurney should assign the said one equal undivided fourth part or

Recital of intended marriage.

Recital of possession of personally under a will.

Recital of possession of stock.

Recital of agreement to assign personally to trustees.

(a) See *ante*, p. 241.

Recital of agreement to transfer stock to trustees.	share or other part or share to which she is entitled as aforesaid of and in the residuary personal estate of her said late father unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same And it was also agreed that the said Grace Gurney should transfer the said sum of £5000 £3 per cent. consolidated bank annuities of which she is possessed as aforesaid into the names of the said Henry Hunter John James and Leonard Lambert to be held by them upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same
Recital of transfer of stock accordingly.	AND WHEREAS the said sum of £5000 £3 per cent. consolidated bank annuities hath been accordingly transferred by the said Grace Gurney out of her name into the names of the said Henry Hunter John James and Leonard Lambert and the same is now standing in their names in the books of the governor and company of the Bank of England as they the said Henry Hunter John James and Leonard Lambert do hereby admit and acknowledge
Testatum.	Now THIS INDENTURE WITNESSETH that in pursuance of the said agreement in this behalf and in consideration of the said intended marriage she the said Grace Gurney with the consent and approbation of the said Charles Catchpole testified by his being a party to and executing these presents HATH granted bargained sold assigned and transferred and by these presents BOTH grant bargain sell assign and transfer unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns ALL that the one equal undivided fourth part or share or other part or share of her the said Grace Gurney under the hereinbefore mentioned will of her said late father John Gurney of and in the residuary personal estate of her said late father and of and in the stocks funds and securities in or upon which the same now is or shall or may at any time or times hereafter be invested and of and in the dividends interest and annual produce thereof AND all the right title claim and demand whatsoever at law and in equity of her the said Grace Gurney in and to the said one equal undivided fourth part or share or other part or share hereby assigned
Assignment.	TO HAVE HOLD RECEIVE AND TAKE the said
Parcels, share of residuc.	
And all the right, &c.	
Habendum.	

one equal undivided fourth part or share or other part or share intended to be hereby assigned of and in the residuary personal estate of the said John Gurney and the investments and income thereof unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage and from and immediately after the solemnization thereof UPON and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same AND the said Charles Catchpole and Grace Gurney do and each of them doth hereby irrevocably nominate and appoint the said Henry Hunter John James and Leonard Lambert and the survivors and survivor of them his executors administrators and assigns to be the true and lawful attornies and attorney of them the said Charles Catchpole and Grace Gurney and each of them (b) in their his or her names or name to ask recover and receive from the executors of the will of the said John Gurney and all and every persons and person liable to pay or transfer the same the said one equal undivided fourth part or share hereby assigned and to give effectual discharges for the same and on non-payment or non-transfer thereof or of any part thereof to commence carry on and prosecute any action or actions suit or suits or other proceedings whatsoever for obtaining payment or transfer thereof And also for all or any of the said purposes from time to time to substitute or appoint any attorney or attornies under them or him And generally to do and execute all such other matters and things in the premises as shall be necessary they the said Charles Catchpole and Grace Gurney hereby agreeing to allow and confirm whatsoever the said Henry Hunter John James and Leonard Lambert or the survivors or survivor of them his executors administrators or assigns shall lawfully do or cause to be done in the premises by virtue hereof AND it is hereby agreed and declared by and between the said parties hereto that they the said Henry Hunter John James and Leonard Lambert their executors

Trust for lady
till marriage.

Power of attorney.

Trust of stock.

(b) This power of attorney is not absolutely necessary, as the *choses in action* which are assigned are equitable only; see *ante*, p. 101.

Trust for intended wife till marriage.

Trust of share of personalty and of stock after marriage.

Trust to continue or vary investments.

With consent.

Declaration of trust of investments.

administrators and assigns shall stand possessed of and interested in the said sum of £5000 £3 per cent. consolidated bank annuities so transferred into their names as aforesaid

IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage And from and immediately after the solemnization thereof **UPON** and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and contained of and concerning the same And it is hereby agreed and declared by and between the said parties hereto that from and after the solemnization of the said intended marriage the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns shall stand possessed of and interested in the said one equal fourth part or share or other part or share hereinbefore assigned of and in the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities **UPON TRUST** that the said trustees or the trustees or trustee for the time being of these presents do and shall either continue the same respectively in their respective actual states of investment or do and shall lay out and invest the same in any of the parliamentary stocks or public funds of Great Britain or at interest upon government or real securities in England or Wales but not in Ireland(c) and do and shall from time to time alter and vary the said stocks funds and securities for or into others of a like nature as often as the said trustees or trustee shall think fit **PROVIDED** that every such investment alteration and variation be made with the consent of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them with the consent of the survivor of them(d) and after the decease of such survivor at the discretion of the said trustees or trustee for the time being of these presents **AND** it is hereby agreed and declared by and between the said parties hereto that after the solemnization of the said intended marriage the said trustees or trustee for the time being of these presents shall stand possessed of and interested in the said

(c) See *ante*, pp. 205, 206.

(d) See *ante*, p. 206.

share of the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities and the stocks funds and securities in or upon which the same may be invested and the dividends interest and annual produce thereof UPON and for the trusts intents and purposes and under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same that is to say UPON TRUST that they the said trustees or trustee for the time being of these presents do and shall during the life of the said Grace Gurney pay the interest dividends and annual produce thereof unto such person or persons as the said Grace Gurney shall from time to time notwithstanding her said intended or any future coverture appoint by any writing under her hand but not by any mode of anticipation and in default of such appointment into her own hands for her sole and separate use (e) exclusive of the said Charles Catchpole and of any future husband but so that she shall dispose thereof in any mode of anticipation And the receipts in writing of the said Grace Gurney or of such person or persons as she shall appoint to receive the said dividends interest and annual produce in manner aforesaid but not in any mode of anticipation shall notwithstanding her said intended or any future coverture be effectual discharges for the same AND from and immediately after the decease of the said Grace Gurney UPON TRUST that the said trustees or trustee for the time being of these presents do and shall pay the dividends interest and annual produce of the said trust monies stocks funds and securities unto or permit the same to be received by the said Charles Catchpole and his assigns for and during the term of his natural life AND from and immediately after the decease of the survivor of them the said Charles Catchpole and Grace Gurney the said trustees or trustee for the time being of these presents shall stand and be possessed of and interested in the said trust monies stocks funds and securities and the dividends interest and annual produce thereof IN TRUST for all and every or such one or more exclusively of the others or other of the

Trust for separate use of intended wife for life.

After decease of intended wife, trust for intended husband for life.

After decease of survivor,

trust for children as intended husband and wife shall jointly appoint.

(e) See *ante*, p. 282.

In default, as survivor shall appoint by deed or will.

In default of appointment,

trust for children equally, sons at 21 years, daughters at 21, or marriage with consent.

Hotchpot clause.

children or child of the said intended marriage with such provision for their respective maintenance and if more than one in such shares and proportions and subject to such limitation and conditions over in favour of any others or other of the said children and in such manner (*f*) as the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by them sealed and delivered in the presence of and to be attested by two or more credible witnesses shall jointly direct or appoint AND in default of such joint direction or appointment and so far as any such joint direction or appointment if incomplete shall not extend as the survivor of them the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him or her respectively sealed and delivered in the presence of and to be attested by two or more credible witnesses or by his or her last will or any codicil or testamentary writing to be by him or her respectively duly executed (and as to the said Grace Gurney notwithstanding any future coverture) shall direct or appoint AND in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend IN TRUST for all and every the children or child of the said intended marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age with the consent of her or their parent or parents guardian or guardians for the time being and to be divided between or amongst the said children if more than one in equal shares as tenants in common and if there shall be but one such child who being a son shall live to attain the age of twenty-one years or being a daughter shall live to attain that age or marry under that age with such consent as aforesaid then the whole shall be in trust for that one or only child But no child taking any part of the said trust monies stocks funds and securities under any appointment to be made in exercise of any of the aforesaid powers shall be entitled to any share of the unappointed part of the said trust monies stocks funds

(*f*) See *ante*, pp. 196, 197.

and securities without bringing his or her appointed share into hotchpot, and accounting for the same accordingly (g) AND if there shall be no child or children of the said intended marriage who shall become entitled to the said trust monies stocks funds and securities under the trusts hereinbefore declared then the said trustees or trustee for the time being shall stand possessed of the said trust monies stocks funds and securities or so much thereof as shall not have been disposed of under the powers and authorities herein contained and the dividends interest and annual produce thereof (subject nevertheless to the trusts hereinbefore declared) UPON and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same that is to say IF the said Charles Catchpole shall depart this life in the lifetime of the said Grace Gurney IN TRUST for the said Grace Gurney her executors administrators and assigns for her own benefit BUT IF the said Grace Gurney shall depart this life in the lifetime of the said Charles Catchpole then after the decease of the said Charles Catchpole and such failure of children as aforesaid UPON and for such trusts intents and purposes and in such manner as the said Grace Gurney by her last will or any codicil or testamentary writing to be by her duly executed notwithstanding her said intended coverture shall direct or appoint (h) AND in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend IN TRUST for the person or persons who under the statutes made for the distribution of the estates of intestates would at the decease of the said Grace Gurney be entitled to her personal estate in case she having survived the said Charles Catchpole had died possessed of the same intestate and to be divided between or amongst the same persons if more than one in the shares in which the same would under the same statutes be divided between or amongst them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that after the decease of the said Charles Catchpole and Grace Gurney and whilst any child or children of the said intended marriage being a son or sons shall be under the age of twenty-one years or being a daughter or daughters shall be under that

If no child shall become entitled.

If intended husband shall die first.

Trust for intended wife absolutely.

If intended wife shall die first.

Upon such trusts as intended wifes shall by will appoint.

In default of appointment.

Trust for next of kin of intended wife.

Maintenance and education clause.

(g) See *ante*, p. 198.

(h) See *ante*, p. 196.

Accumulation
clause.

Power of ad-
vancement.

age and unmarried the said trustees or trustee for the time being of these presents do and shall apply the whole or such part as the said trustees or trustee for the time being shall think fit of the dividends interest and annual produce of the expectant or presumptive share of each such child in the said trust monies stocks funds and securities for or towards his or her maintenance and education or otherwise for his or her benefit and that the said trustees or trustee for the time being may either themselves or himself so apply the same or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof(i) AND do and shall lay out and invest the surplus if any of the said interest dividends and annual produce in the names or name of the said trustees or trustee for the time being in any of the stocks funds or securities hereinbefore mentioned to be from time to time altered and varied for or into any other stocks funds and securities of a like nature as often as the said trustees or trustee shall think fit so that the same may accumulate by way of compound interest and the accumulations to be so made shall be added to the fund or respective funds from which the same shall have proceeded and be subject to the same trusts and provisions in every respect and so that the dividends interest and annual produce of each such accumulated fund may be subject to the provision hereinbefore contained for the maintenance and education at any subsequent period of minority of the child from whose expectant or presumptive share the same shall have proceeded PROVIDED ALSO and it is hereby agreed and declared that it shall be lawful for the said trustees or trustee for the time being of these presents during the joint lives of the said Charles Catchpole and Grace Gurney with their consent in writing and after the decease of either of them with the consent in writing of the survivor of them which consent shall be binding whether the said Grace Gurney shall be covert or sole and after the decease of such survivor at the discretion of the said trustees or trustee for the time being to raise and apply a sufficient part of the expectant share of any child of the said intended marriage in the said trust monies stocks funds and securities for or towards his or her advancement in

(i) See *ante*, p. 203.

the world notwithstanding he or she shall not then have attained the age of twenty-one years or after he or she may have attained that age in the lifetime of the said Charles Catchpole and Grace Gurney or the survivor of them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the said trustees or trustee for the time being at any time or times during the lives or life of the said Charles Catchpole and Grace Gurney or the survivor of them with their his or her consent and approbation in writing signed with their his or her hands or hand to convert into money the whole or any part of the said stocks funds and securities and to lay out the monies arising thereby in the purchase of any freehold or copyhold estates in England or Wales of an estate of inheritance in fee simple in possession free from all incumbrances except quit rents and copyhold and customary dues and services (*k*) to be conveyed or surrendered to the said trustees or trustee for the time being their or his heirs and assigns UPON TRUST nevertheless with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them to be signified by writing signed with their his or her hands or hand during the lifetime of them or the survivor of them and after the decease of the survivor of them then at the discretion and of the proper authority of the said trustees or trustee for the time being of these presents to sell and dispose of the said estates which shall have been so purchased as aforesaid either by public auction or private contract in one lot or in parcels subject to such special conditions of sale and for such price or prices as to the said trustees or trustee for the time being shall seem reasonable with power at any public auction of the said premises or any of them to buy in the same or any of them and also to vary or rescind any contract for the sale of the same or any part thereof and either by public auction or private contract in one lot or in parcels to resell the same without responsibility for any loss to be occasioned thereby and to convey and assure the said premises which shall be sold to the purchaser or respective purchasers thereof or as he she or they respectively shall direct AND UPON

Power to invest
in the purchase
of lands.

Trust for sale
of lands to be
purchased.

(*k*) See *ante*, p. 207.

Trust of sale monies the same as monies laid out.

Purchased estates to be considered as money.

Power of leasing estates to be purchased.

Power for trustees to settle with executors as to share of residue ;

TRUST to apply the monies arising from such sale after payment of the costs charges and expenses attending the same Upon and for such and the same trusts intents and purposes as the monies so raised and laid out in the purchase of such estates were subject to before such purchase was made or would have been subject to if the same had not been laid out therein AND ALSO UPON TRUST in the mean time and until such estates shall be so resold to apply the rents and profits thereof in such manner as the interest dividends and annual produce of the monies laid out in the purchase thereof would have been applicable under the trusts hereinbefore declared in case such purchase had not been made IT BEING hereby agreed and declared that the estates to be purchased under this present power as aforesaid shall when so purchased be considered as money and be subject to such and the same trusts in all respects as the monies laid out in the purchase thereof were subject to before such purchase was made or would have been subject to if the same had not been laid out therein PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the trustees or trustee for the time being of the estates so to be purchased by virtue of such power as aforesaid with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them testified by some writing under their his or her hands or hand and after the decease of such survivor then at the discretion and of the proper authority of the said trustees or trustee by deed at any time or times to demise and lease the same estates or any of them or any part thereof to any person or persons whomsoever for any term of years not exceeding twenty-one years to take effect in possession and not by way of future interest at the best yearly rent that can be had or gotten for the same and without any fine or foregift for the making thereof and upon such other terms and conditions as the said trustees or trustee shall think fair and reasonable PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the trustees or trustee for the time being of these presents with the consents in writing of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease

of either of them with the consent in writing of the survivor of them and after the decease of such survivor at the discretion of the said trustees or trustee to settle and ascertain in such manner as they or he shall deem expedient the amount of any monies properties or effects due to or claimed by them or him under these presents by virtue of the will of the said John Gurney deceased and also to pass and allow the accounts of the person or persons paying over or transferring the same monies properties or effects or any part thereof and to accept any monies properties or effects which the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall deem it expedient to accept in lieu of or satisfaction for the whole of the said premises hereby assigned and to give releases and discharges to the accounting party or parties for the same premises or any part thereof as fully and effectually as the trustees or trustee for the time being of these presents might or could do if they or he were absolute and beneficial owners or owner of such premises AND if any disputes or difficulties shall at any time arise in relation to the said premises hereby assigned or any part thereof it shall be lawful for the trustees or trustee for the time being of these presents if they or he shall think proper with such consent or at such discretion as aforesaid to refer any such disputes or difficulties to arbitration in the usual manner or otherwise to settle and adjust the same in such manner in all respects as the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall think proper PROVIDED ALSO and it is hereby further agreed that it shall be lawful for the trustees or trustee for the time being of these presents in their or his discretion to postpone or forbear the exercise and enforcement of all or any of the powers and remedies hereby vested in or which shall or may be exercisable by such trustees or trustee by virtue hereof any thing herein contained or any rule at law or equity to the contrary notwithstanding PROVIDED ALSO and it is hereby agreed and declared by and between the said parties hereto that the receipts in writing of the trustees or trustee for the time being acting in the execution of the trusts or powers of these presents for any monies payable to them or him by virtue of these presents shall effectually discharge the person

and to pass
their accounts.

Power to refer
to arbitration.

Power for trustees to postpone and forbear exercise and enforcement of powers and remedies.

Receipt clause.

Power to accept other securities.

And to discharge part of the hereditaments comprised in any security.

Power to appoint new trustees.

or persons paying the same from all responsibility as to the misapplication or nonapplication thereof and from all obligation of seeing to the application thereof⁽¹⁾ AND ALSO that it shall be lawful for the trustees or trustee for the time being of these presents but during the lives of the said Charles Catchpole and Grace Gurney and the life of the survivor of them with their his or her consent in writing to accept other real securities for any part of the said trust funds which may be invested in real securities and the interest thereof in lieu of and as a substitution for the hereditaments or any part of the hereditaments comprised in any such security AND ALSO to discharge from any such security any part or parts of the hereditaments therein comprised and without which the said trustees or trustee shall deem the existing security or securities sufficient and every such acceptance of a new security and every release of all or any part of the hereditaments comprised in the existing securities shall be binding on all persons interested in the said trust funds and the interest thereof and the persons deriving title to the hereditaments so released shall not be obliged to inquire into the sufficiency in point of value or title of the substituted or retained security or securities PROVIDED ALSO and it is hereby further agreed and declared by and between the said parties hereto that if the said trustees hereinbefore appointed or any or either of them or any future trustee or trustees to be appointed as hereinafter is mentioned shall happen to die or shall go to reside beyond the seas or shall be desirous of being discharged or shall decline or become incapable to act in the trusts or powers herein contained before the same shall be fully performed or otherwise satisfied then and in every such case it shall be lawful for the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them for the survivor of them and after the decease of such survivor for the surviving or continuing trustees or trustee for the time being of these presents or the acting executors or administrators of the last surviving or continuing trustee by any deed or deeds instrument or instruments in writing to be by them him or her

(1) See *ante*, p. 209.

sealed and delivered in the presence of and to be attested by two or more credible witnesses to substitute and appoint any other person or persons to be a trustee or trustees in lieu of the trustee or trustees so dying going to reside beyond the seas desiring to be discharged declining or becoming incapable to act as aforesaid^(m) AND THAT when any new trustee or trustees shall have been appointed as aforesaid all the said trust estates monies and premises which shall be then vested in the trustees or trustee for the time being of these presents or in the heirs executors or administrators of the last surviving or continuing trustee shall with all convenient speed be conveyed assigned transferred and paid so as effectually to vest the same in the surviving or continuing trustees or trustee and such new or other trustee or trustees or if there shall be no surviving or continuing trustee then in such new trustees or trustee only upon the same trusts as are hereinbefore declared concerning the same or such of the same trusts as shall be subsisting or capable of taking effect AND it is hereby agreed and declared that every such new trustee shall in all things act and assist in the management and execution of the trusts and powers to which he shall be so appointed as effectually and with the same powers authorities exemptions and discretion as if he had been originally by these presents nominated a trustee for the purposes aforesaid PROVIDED ALSO and it is hereby agreed and declared by and between the said parties hereto that the trustees or trustee for the time being of these presents shall be chargeable respectively only with so much money as they respectively shall actually receive by virtue of the trusts hereby in them reposed notwithstanding their respectively joining with any co-trustees or co-trustee in the signature of receipts for the sake of conformity and shall not be answerable or accountable the one for the other or others of them or for any banker broker or other person with whom the said trust monies or any part thereof may be lodged for safe custody or for the insufficiency or deficiency of any stocks funds or securities wherein the same may be invested in pursuance of these presents nor for any defect in title in any hereditaments or pre-

Trustees' indemnity clause.

^(m) See *ante*, p. 409.

Trustees' reimbursement
clause.

mises on the security whereof the said trust monies or any part thereof may be invested or which may be purchased under the power for that purpose hereinbefore contained nor for any other loss or damage which may happen in the execution of any of the trusts or powers herein expressed or in relation thereto unless the same shall happen through their own wilful default respectively (*n*) AND it is hereby further agreed and declared that it shall be lawful for the trustees or trustee for the time being of these presents out of the monies which shall come to their respective hands by virtue of these presents to retain to and reimburse themselves respectively and to allow to their co-trustees all such costs charges damages and expenses as they or any or either of them may sustain or incur in or about the execution of any of the trusts or powers herein expressed or in relation thereto IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

(*n*) See *ante*, p. 211.

INDEX.

A.

ABILITY, representation as to, 72, 301.

ABSTRACT of title, 302.

ACCEPTANCE of goods, what is, 37.
of offer, 70.

ACCEPTOR of a bill, liability of, 74.

ACCUMULATION, restraint on, 194.

ACKNOWLEDGMENT, remarks on, by wife, of the conveyance of her real estate, 288.

ACT of bankruptcy, what is, 104, 108, 110, 111, 112.

bonâ fide transactions valid notwithstanding, 118.

—See BANKRUPTCY.

ACTION, chose in, 4, 100, 274, 300.—See CHOSE IN ACTION.

ACTIONS, real, personal and mixed, 3.

ex delicto, 55.

personal, 56.

of detainee, 3.

of trover, 22, 41, 44.

of replevin, 3.

of debt, 60.

of debt by husband for arrears of wife's rent, 276.

limitation of, 294—298.

ADEMPTION of specific legacy, 248.

ADJUDICATION of bankruptcy, 118.

ADMINISTRATOR *durante minore etate*, 238, 259.

who appointed, 257.

joint, 258.

rights and powers of, *ib.*

his year, 259.

durante absentia, *ib.*

pendente lite, 260.

cum testamento annexo, *ib.*

office of, not transmissible, 261.

de bonis non, *ib.*

not bound to plead the statute of limitations, 298.

ADMINISTRATION, stamp on letters of, 260.

court from which taken out, *ib.*

- ADMINISTRATION, husband's right to, of his wife's effects, 276.
- ADMISSION of debt, 110.
- ADVANCEMENT to children to be accounted for in distribution, 262.
form of power of, in a settlement, 322.
- AFFIDAVIT of debt, filing an, 110.
- AGENTS, 292.
- AGREEMENTS which require to be in writing, 36, 39, 66.—See CONTRACTS.
- ALIEN, 42.
may be bankrupt, 108.
- ALIENATION of choses in possession, 31, 34.
void, 43.
involuntary, 45.
of choses in action, 100, 102, 278, 300.
growth of right of testamentary, 233.—See ASSIGNMENT.
- ALIMONY, 286.
- ALLOWANCE of bankrupt, 121.
- ALTERATION of a deed, 75.
- ANIMALS *feræ naturæ*, 18.
- ANNUITIES, bank, 149.—See STOCK IN THE FUNDS.
- ANNUITY creditors, proof by, 116.
apportionment of, 190.
apportionable if given for maintenance, 191.
legacy duty on, 248.
warrant of attorney to secure, 86.
personal, 148.
- ANTICIPATION, restraint on, 282.
- APPOINTMENT of portions, 196.
illusory, 197.
exclusive, *ib.*
voluntary, 195.
amongst a class, 198.
to issue of a child, when good, 199.
fraudulent by a father, 200.
creating a perpetuity, 201.
of new trustees, 209.
by wife in favor of her husband, 284.
form of power of, amongst children, 319.
form of power of, by wife, 321.
- APPORTIONMENT of income, 190.
- ARBITRATION, 137.
act for determining differences by, 139.
power of assignees to submit to, 232.
- ARREARS of rent, 92.
of rent, limitation of actions for, 295, 296.
action by husband for, of rent of wife's estate, 276.

- ARREARS of interest on bond, 94.
 of interest, limitation of actions for, 295, 296.
 of dower, 296.
- ARREST, freedom of bankrupt from, 94.
- ASSENT of executor, 238.
- ASSETS, executor not liable beyond amount of, 246.
- ASSIGNEES of bankrupt, 117, 118.
 official, 115.
 of insolvent, 127.
 what proceedings of, require consent of creditors, 232.
- ASSIGNMENT of choses in possession, 31, 32, 34.
 of choses in action, 100, 101.
 notice of, 300.
 of breaches, 94.
 of letters-patent, 177.
 of copyright, 180.
 in trust for creditors, 104.
 of wife's reversionary choses in action, 278.
 inquiry as to prior, of chose in action, 301.
 of choses in action, form of an, 316.
- ASSUMPSIT, 61.
- ATTORNEY, warrant of, 85.
 execution and attestation of warrant of, 86.
 warrant of, executed by insolvent debtor, 130.
 power of, on assigning a legal chose in action, 100.
 power of, construed strictly, 292.
 form of a power of, 317.
 not liable as such to the bankrupt laws, 108.
- AUCTION, sale by, 38.
- AWARD, 140.
 time of making, 141.
 enlargement of time of making, 142.
 must be certain and final, 143.
 setting aside, 144.
 effect of, 146.
 performance of, *ib.*
 stamp on, 147.
 limitation of actions on, 297.

B.

- BAILEE, possession of, 25, 37.
- BAILMENT, 24.
- BANK annuities, 149.—*See STOCK IN THE FUNDS.*
 notes, title to, 290.
- BANKING companies, 162.
 act for incorporation of, 165.

- BANKRUPTCY**, who may be bankrupt, 107.
 of joint stock companies, 167.
 of a trading partnership, 226.
 act of, 104, 108, 110, 111, 112, 118.
 concerted, 109.
 petitioning creditor, 112.
 fiat, 113.
 goods in bankrupt's possession, order or disposition, 47.
 choses in action in bankrupt's possession, order and disposition, 301.
 revival of debt barred by, 65, 70.
 court of, 83, 113, 118.
 judgment on warrant of attorney or *cognovit*, in case of, 88.
 how assignees sue for debts, 102.
 exercise of powers by assignees in, 195.
 when assignment in trust for creditors, an act of, 104.
 adjudication of, 113.
 examination of bankrupt and wife, 119.
 debts paid rateably in, *ib.*
 certificate, 121.
 liability of bankrupt to claims not proved, 122.
 uncertificated bankrupt, *ib.*
 effect of certificate in case of previous, 123.
 inefficiency of present laws, *ib.*
 does not determine a submission to arbitration, 141.
 voluntary assignment void in event of, 214.
 consent of creditors when required to proceedings of assignees, 232.
- BARGAIN** and sale, by commissioners of bankrupt, 117.
- BARNARD**, Sir John, his act, 80, 152.
- BASTARD**, gift by will to, 252.
- BENEFICE**, charge by clergyman on, void, 79.
 right of nomination to, does not pass to assignees, 195.
 sequestration of, in insolvency, 128.
- BEQUEST** of stock in the funds, 157.
 executory, 187.
 general, operates as an exercise of a general power, 196.
 to charities, 251.
 to illegitimate children, 252.
 to children, 254.
- BILLS** of exchange, 72, 101.
 what prohibited, 73.
 indorsement of, *ib.* 74.
 consideration presumed, 72, 75.
 have no preference over other simple contract debts, 95.

- BILLS of exchange always carry interest, 98.
 title to, 290.
- BILLS of lading, 34, 54.
- BONA notabilia, 242, 260.
- BOND, 92.
 single, 93.
 with condition, *ib.*
 joint, 217, 219, 222.
 joint and several, 224.
 for performance of agreements, 94.
 interest of money secured by, *ib.*
 limitation of actions on, 295.
 voluntary, 95.
- BONUS, 189.
- BOTTOMRY, 136.
- BREACHES, assignment of, 94.
- BRITISH possessions abroad, copyright in, 131.
 vessels, 48.
- BROTHERS, right of, under Statute of Distributions, 262.
- BUILDING societies, 169.

C.

- CAPIAS ad satisfaciendum, writ of, 90.
- CASTS, copyright in, 183.
- CERTIFICATE of ship's registry, 49.
 of ship's registry, recital of, 51.
 bankrupts, 121, 123.
 bankrupts, revival of debt barred by, 65, 70.
- CHANCERY, Court of, invests in consols, 150.
 transfer of stock by order of, 153.
 order of, restraining transfer, 302.
- CHARACTER, representations as to, 71.
- CHARITIES, bequest to, 251.
- CHARTER party, 54.
 companies incorporated by, 159.
- CHATTELS, personal, 2.
 of wife belong to her husband, 273.
 real, 2.
 vegetable, 15.
 sale of, in market overt, 291.
- CHILDREN, appointments to, 196, 198.
 younger, 199.
 in ventre, *ib.*
 vesting of portions of, 203.
 maintenance of, *ib.* 204, 205.
 form of power of maintenance of, in a settlement, 321.

- CHILDREN**, covenant to settle property on, 213.
 gifts to illegitimate, 252.
 gifts to, *ib.* 254.
 shares of, under Statutes of Distribution, 262.
 custody of infant, 285.
 form of powers of appointment amongst, 319.
 form of trusts for, 320.
- CHOSE** in action, 4, 5, 274.
 assignment of legal, 100.
 assignment of equitable, 101.
 right of husband to wife's legal, 275.
 right of husband to wife's equitable, 276.
 Statutes of Limitation as to, 294.
 notice of assignment of, 300.
 in possession, 4, 5.
 alienation of, 31, 34.
 title to, 291.
 Statute of Limitations as to, 294.
- CIVIL** law, age at which a will may be made by the, 234.
 degrees of kindred traced according to the, 263.
 rules of the, as to restraint of marriage, 269.
- CLASS**, appointment amongst a, 198.
 bequest to a, 254.
- CLAUSES** consolidation acts, 159, 160.
- CLERGYMAN**, insolvent, 128.
- COAT** armour, 13.
- COGNOVIT**, 85.
 execution and attestation of, 86.
 to be filed within twenty-one days, 87.
 effect of, in case of bankruptcy or insolvency, 88.
- COHABITATION**, bond to induce, void, 77.
 bond for past, good, *ib.*
- COLONIES**, patent for, 176.
 copyright in, 181.
- COMMISSION** of bankruptcy, 113.
- COMMITTEE** of lunatic entitled to stock, 154.
 man, liability of provisional, 231.
- COMPANIES**, joint stock, 159.—See **JOINT STOCK COMPANIES**.
- COMPARISON** of title to real and personal estate, 304.
- COMPOSITION** with creditors, 104.
 act to facilitate, 105.
 in bankruptcy, 121.
 by assignees of bankrupt or insolvent, 232.
- CONCERTED** bankruptcy, 109.
- CONSENT** to change of investments, 206.
 forfeiture on marriage without, 270.
- CONSIDERATION** necessary to a contract, 62.

CONSIDERATION executed, 62.

illegal, 63.

valuable, *ib.*

good, 64.

must be in writing to form a written contract, 67.

why presumed to a note, 75.

CONSOLS, 150.—See STOCK IN THE FUNDS.

CONTINGENCY, proof of debts payable on, 116.

CONTINGENT remainders, none in personal estate, 193.

CONTRACTS, 60.

when writing required to, 36, 39, 66.

definition of, 61.

parol, 66.

with unlawful object, 76.

usurious, 81.

for sale of goods, 35.

CONVERSION of money into land or land into money, 208.

CONVEYANCER, certificated, has no general lien, 29.

CONVICTS, 43.

COPYRIGHT, 177.

in encyclopædias, reviews, &c. 179.

in dramatic and musical compositions, 180.

assignment of, *ib.*

personal property, 181.

in prints, maps, &c. 182.

in sculptures, 183.

international, *ib.*

in designs, 185.

CORPORATIONS, 158.

COSTS, proof of, in bankruptcy, 116.

of trustees, 210.

CO-SURETIES, 99.

COVENANT, 92.

for settlement of wife's future property, 212.

to settle husband's property, 213.

joint, 217, 219, 223.

joint and several, 224.

not to sue one joint and several debtor, 225.

for title, 303.

CREDITORS, gifts for defrauding, 43, 214.

composition with, 104.

assignment in trust for, *ib.*

petitioning on bankruptcy, 112.

proof by, holding security, 116.

assignees of, in bankruptcy, 117.

voluntary settlement void as against, 214.

trust for payment of, when revocable, 215.

consent of, required for what proceedings of assignees, 232.

- CREDITORS may by custom take out administration, 258.
 Statutes of Limitation not affected by death of, 298.
- CROPS, 16.
- CROWN debts, 84.
 in bankruptcy, 120.
 jewels, 13.
 right of, to intestate's estates if no next of kin, 265.
- CUSTOMS of London and York, 264.
 of Wales, 265.
 of trades, 294.
- D.
- DAMAGES, actions which sound in, 60.
 liquidated, *ib.*
 limitation of actions for, 297.
- DEATH, actions by executors in case of, 56.
 of creditor, effect of, 298.
 of debtor, effect of, *ib.*
- DE BONIS NON, administration, 261.
- DEBT, action of, 60.
 by husband for arrears of wife's rents, 276.
- DEBTS, how assignable, 4, 100.
 barred by bankruptcy, revival of, 65, 70.
 barred by Statute of Limitations, revival of, 65.
 of record, 83.
 crown, 84.
 judgment, *ib.*
 charge on stock of judgment, 155.
 specialty, 91.
 simple contract, 95.
 interest on, 97.
 when taken in execution, 102.
 payment of, *ib.*
 appropriation of payments, 103.
 filing an affidavit of debt, 110.
 admission of, *ib.*
 proof of, in bankruptcy, 115.
 set-off of mutual, in bankruptcy, *ib.*
 all debts in bankruptcy paid rateably, 119.
 payment of, by executor, 245.
 satisfaction of, by legacies, 250.
 payment of, by administrator, 258.
 husband's liability to wife's, 279, 286.
 covenant to indemnify husband against wife's, 284.
 limitation of actions for, 295, 296, 297.
 charge of real estate for payment of, 298.
 notice to debtor on assignment of, 101, 300.
- DEBTOR, notice to, on assigning the debt, *ib.*

- DEBTOR, bankruptcy of.—See BANKRUPTCY.
 insolvent.—See INSOLVENT DEBTORS.
 appointment of, executor, 239.
 effect of death of, 298.
- DEBTOR and creditor, defects in the law of, 95.
- DECLARATION of insolvency, 109.
- DECREE of a court of equity, 90.
 disobeying, when an act of bankruptcy, 111.
- DEED, title-deeds pass by conveyance of the lands, 9.
 tenant for life entitled to possession of the deeds, 11.
 alienation by, 34.
 contracts by, 75.
 alteration or rasure of a, *ib.*
 solicitor's lien on, 28.
 boxes, 13.
- DEFEAZANCE to warrant of attorney, 85.
- DEGREES of kindred, how traced, 263.
- DELIVERY, alienation of personal chattels by, 32.
 constructive, 33, 37.
- DEMONSTRATIVE legacy, 249.
- DENIZEN may be bankrupt, 108.
- DESCENT, remarks on law of, 266.
 remarks on, to distant heirs and kindred, 268.
- DESIGNS of articles of manufacture, copyright in, 185.
- DETINUE, action of, 3.
 limitation of action of, 294.
- DILAPIDATIONS, 59.
- DIRECTORS of joint stock companies, powers of, 231.
 notice to, *ib.*
- DISABILITIES, savings of, 294, 296, 297.
- DISCLAIMER of title or specification of invention, 175.
- DISHONOUR of bill or note, notice of, 74.
- DISTANT heirs and kindred, remarks on descent to, 268.
- DISTRESS by husband for arrears of wife's rent, 276.
- DISTRIBUTION, Statutes of, 261.
 remarks on law of, 265.
- DISTRINGAS, 154, 302.
- DIVIDENDS, payment of, in bankruptcy, 119.
 unclaimed, of stock in the funds, 299.
- DOCK warrants, 33.
- DOCKET, striking a, 112.
- DONATION mortis causà, 237.
- DOWER, legacy in lieu of, 250.
 limitation of actions for arrears of, 296.
- DRAMATIC pieces, copyright in, 180.
- DRAWEE of a bill, 72.
- DRAWER of a bill, *ib.*

- DRAWER of a bill, liability of, 74.
 DURANTE absentia, administrator, 259.
 DURANTE minore ætate, administrator, 238.

E.

- EDUCATION of children, provisions for, 203.
 form of power of, in a settlement, 321.
 EJECTMENT, one executor may bring, 239.
 ELECTION, that lands should not be sold, 208.
 ELEGIT, writ of, 46.
 EMBLEMENTS, 16.
 ENCYCLOPÆDIAS, copyright in, 178.
 ENGRAVINGS, copyright in, 182.
 EQUITABLE chose in action, 5.
 EQUITY, decree of Court of, 90.
 life interests in, 188.
 considers as done what is agreed to be done, 208.
 of wife to a settlement, 277.
 ESCAPE, limitation of action for, 297.
 ESTATES, none in personal property, 7, 186.
 EXCHEQUER bills, 205.
 EXCLUSIVE appointment, 197.
 EXECUTION on a judgment, 45.
 in case of bankruptcy or insolvency, 88.
 sale of goods, how affected by, 291.
 EXECUTOR, actions by, for injury to estate of deceased, 56.
 actions against, for wrong done by deceased, 58.
 liability of, carrying on trade, 228.
 appointment of, 237.
 assent of, 238.
 of executor, 239.
 appointment of debtor, *ib.*
 de son tort, 240.
 acts of, before probate, 241.
 power of, 245.
 purchase from, *ib.*
 his year, *ib.*
 liability of, 246.
 his former right to the residue, 255.
 now trustee for the next of kin, *ib.*
 EXECUTORS, any one may perform acts of administration, 239.
 all must join in bringing actions, *ib.*
 any one may bring ejectment, *ib.*
 administrators and assigns, use of the words, 192.
 of objects of a power cannot take under an appointment
 198.
 not bound to plead the Statutes of Limitations, 298.

EXECUTORY bequests, 187.
 EXECUTORY interests in personal estate, 194.
 EXECUTRIX, married woman, 238.

F.

FACTORS, 292.
 FATHER, appointments by, must not be for his own benefit, 200.
 bound to maintain his children, 204.
 right of, under Statute of Distributions, 262.
 FELONY, forfeiture on conviction of, 43.
 FEME covert, 272.—See MARRIED WOMAN AND WIFE.
 FERÆ *naturæ*, animals, 18.
 FIAT in bankruptcy, 113.—See BANKRUPTCY.
 FIERI *facias*, writ of, 45.
 securities which can be taken under, 102.
 limitation of action for money levied under, 297.
 FINES for copyhold estates, limitation of actions for, *ib*.
 FIRE insurance, 135.
 FISH, 18.
 FIXTURES, 13.
 FOREIGN judgment, 90.
 FORFEITURE of goods, 43.
 FRAUD on a power, 200.
 FRAUDS, Statute of.—See STATUTE 29 CAR. 11. c. 3.
 FREIGHT, 54.
 FRIENDLY societies, 168.
 FRUIT, 17.
 FUNDS, the, 150.—See STOCK IN THE FUNDS.
 FUTURE property, covenants to settle, 212, 213.

G.

GAME, 19.
 GAMING, 80.
 GAZETTE, evidence of bankruptcy, 114.
 GENERAL lien, 27.
 ship, 54.
 legacy, 249.
 GIFT and delivery, 32.
 GOODS, property in, 21.
 constructive delivery of, 33.
 sale of, 34, 291.
 forfeiture of, 43.
 mortgage of, 44.
 gift of, for life, in law, 186.
 in equity, 188.

GOODS stolen, 291.

limitation of actions for, 294.

GOVERNMENT securities, what are, 205.

GRANT of goods, 31.

GUARDIANS, effect of concurrence of, in settlements, 271.

H.

HALF blood, claim in distribution equally with the whole, 262, 263, 265.

HAWKS, 18.

HEIR looms, 12.

specialty debts in which he is bound, 92.

HEIRS, word inapplicable to personal estate, 192.

remarks on descent to distant, 268.

HIRE of goods, 25.

HOLDER of a bill or note, 74.

HORSES, sale of stolen, 292.

HOTCHPOT, clause of, in settlements, 198.

advancements to be brought into, on intestacy, 262.

form of clause of, in a settlement, 320.

HOUNDS, 18.

HUSBAND, covenant to settle his property, 213.

no duty on legacy to, 247.

ancient rights of, 272.

right to wife's chattels personal, 273.

gifts by, to wife of jewels and trinkets, *ib.*

his right to wife's legal choses in action, 275.

his right to wife's equitable choses in action, 276.

effect of his assignment, 278.

his assignment of his wife's reversionary choses in action,

ib.

his liability to his wife's debts, 279, 286.

fraud on his marital rights, 280.

covenant to indemnify, against wife's debts, 284.

his right to the custody of infant children, 285.

and wife, remarks on law of, 287.

I.

IDIOT, 42.

transfer of stock of, 153, 154.

ILLEGALITY of contracts, 63, 77.

ILLEGITIMATE children, gift to, 252.

ILLUSORY appointments, 197.

IMMORAL publication, 78.

- IMPORTATION of foreign reprints of English books, 181.
- IMPRISONMENT of debtor in execution, 90.
 freedom of bankrupt from, 114.
 of bankrupt or his wife, 119.
 discharge of insolvent from, 126, 129.
 saving of disability of, 294.
- INCOME, apportionment of, 190.
- INCORPORATION of joint stock companies, 164, 165.
- INCORPOREAL personal property, 148.
 anciently none, 4.
- INDEMNITY of trustees, 211.
 form in a settlement of proviso for, 327.
- INDORSEMENT of sale of ship on certificate of registry, 52.
 of bills and notes, 73, 74.
 special, 73.
 in blank, *ib.*
- INFANCY, confirmation of debt incurred in, 66, 71.
 saving of disability of, 294.
- INFANT, 42.
 cannot be a bankrupt, 102.
 stock of, 153, 154.
 executor, 238.
 legacy to, 247.
 marriage settlement not binding on, 271.
 custody of, 235.
- INFERIOR courts of record, 83, 84.
 judgments of, 91.
- INJURY, actions by executors in respect of, 56.
 actions against executors in respect of, 58.
- INSOLVENCY, 126, 130.
 judgment on warrant of attorney, or cognovit in case of, 88.
 how assignees sue for debts, 102.
 declaration of, 109.
- INSOLVENT debtors, court for relief of, an inferior court of record, 83.
 petition for discharge under act, an act of bankruptcy, 111.
 schedule of, 128.
 discharge of, 126, 129.
 warrant of attorney executed by, 130.
 exercise of powers by assignees of, 195.
 consent required to what proceedings of the assignees, 232.
- INSPECTORSHIP, deed of, 104.
- INSURANCE, 133.
 of life, *ib.*
 fire, 135.
 of ships, *ib.*

- INTEREST, legal rate of, 81.
 on judgment debt, 89.
 on bond, 94.
 on debts, 97.
 appropriation of payments towards, 103.
 rebate of, in bankruptcy, 115.
 proof of, in bankruptcy, 116.
 on debts proved in bankruptcy, 120.
 always apportioned, 191.
 limitation of actions for arrears of, 295, 296.
- INTERNATIONAL copyright, 183.
- INTESTACY, 256.
- INVENTOR of patent, 173.
- INVESTMENT of settled funds, 205.
 form of trust to continue or vary with consent, 318.
 consent to change, 206.
- IRELAND, real securities in, *ib.*
- IRISH patent, 176.
- ISSUE, appointment to, 199.

J.

- JOINT bequest, no lapse by decease of one legatee, 253.
- JOINT bond, all must sue, 217.
 release by one obligee, bars all, *ib.*
 form of, 222.
- JOINT and several bond, 224.
- JOINT covenant, 219.
 form of, 223.
- JOINT and several covenant, 224.
- JOINT and several debts in bankruptcy, 221, 226.
- JOINT debtors, 223.
- JOINT liability, 222.
 and several liability, 224.
 of partners, 225, 226.
- owners, 217.
 trustees made, *ib.*
 shares of, under a will, need not vest at the same time, 218.
 limitation to them, their executors, administrators and assigns, *ib.*
- JOINT stock companies, 153.
 incorporated by charter or act, 159.
 inconvenience of unincorporated, 161.
 registration act, 162.
 banking, 162, 165.
 liability of shareholders in, 160, 165, 166.

- JOINT stock companies, bankruptcy of, 167.
 shares in, not goods, wares or merchandize, 168.
 powers of directors of, 231.
 liability of provisional committeemen of projected, 231.
- JUDGMENT, effect of, on goods, 46.
 debt, a debt of record, 84.
 on warrant of attorney or cognovit, 86.
 in case of bankruptcy or insolvency, 88, 120.
 carries interest, 89.
 entitled to preference in administration, *ib.*
 foreign, 90.
 nonpayment of debt, when an act of bankruptcy, 111.
 charge of, on stock, 155.
 charge of, on shares, 170.
 limitation of actions for money secured by, 295.

K.

- KIN, next of, their right to administration, 258.
 how traced, 263.
- KINDRED, degrees of, how traced, *ib.*
 remarks on descent to distant, 268.

L.

- LANDS, sale of, 34.
 investment of settled funds in purchase of, 207.
- LAPSE, 253.
- LEGACIES, no action at law for pecuniary, 5.
 payment of, 245, 246.
 duty on, 246.
 no duty on, to husband, wife or royal family, 247.
 to infants, *ib.*
 specific, 248.
 ademption of, *ib.*
 demonstrative, 249.
 general, *ib.*
 in lieu of dower, 250.
 satisfaction of debts by, *ib.*
 satisfaction of portions by, 251.
 to charities, *id.*
 to illegitimate children, 252.
 to children, 254.
 limitation of suits for, 295.

LETTERS patent.—See PATENT.

LEVARI facias, writ of, 46.

LIABILITY, joint, 222.

joint and several, 224.

of partners in trade, 225, 229.

of executor carrying on trade, 228.

of executor for debts, 246.

LICENSE, letter of, 104.

to use patent, 176.

LIEN, 26.

how lost, 29, 39.

of solicitors, 28.

of vendor, 39.

on property from covenant to settle, 213.

LIFE insurance, 134.

no estate for, in personal property at law, 186.

bequest of term for, 187.

interests in equity in personalty, 188, 192.

right of tenant for, as to bonus, 190.

apportionment of income of tenant for, *ib.*

LIMITATIONS, Statutes of, 294.

executors or administrators not bound to plead, 298.

operation of, barred by charge of real estate, *ib.*

operation of, not barred by charge of personal estate, 299.

LIQUIDATED damages, 60.

LOAN societies, 169.

LONDON, custom of, 233, 264.

LORDS, House of, a superior court of record, 83.

LOST article, 22.

LUNATIC, 42.

transfer of stock of, 153, 154.

M.

MAINTENANCE, crime of, 4.

of children, provisions for, 203, 204, 205.

form of power of, in a settlement, 321.

MAKER of a promissory note, 73.

MALA fides on receipt of money or negotiable securities, 290.

prohibita, 76.

in se, *ib.*

MANUFACTURED goods, property in, 36.

contract to furnish, 294.

- MANUFACTURES, patent for new, 173.
 copyright in designs for articles of manufacture, 185.
- MAPS, copyright in, 182.
- MARINES, wills of, and administration to, 236, 244, 261.
- MARITAL rights, fraud on husband's, 280.
- MARKET overt, sale of chattels in, 291.
 sale of stolen goods in, *ib.*
- MARRIAGE, a valuable consideration, 63, 214.
 restraints on, 269.
 consent to, 270.
 brocage, 270.
 agreement on, must be in writing, 67.
 settlement on, 214, 270.
 form of a settlement on, 315.
- MARRIED woman, 42.
 when she may be bankrupt, 108.
 executrix, 238.
 saving of disability of, 294.
 See WIFE.
- MEMORANDUM in writing, what is, 38, 69.
- MINOR, will of, now invalid, 234.
 See CHILDREN AND INFANT.
- MODELS, copyright in, 183.
- MONEY, title to, 290.
- MONOPOLIES, statute of, 171.
- MORTGAGE of goods, 44.
 of ships, 53.
 limitation of action for money secured by, 295.
- MORTIS CAUSA, donation, 237.
- MORTMAIN, Statute of, 251.
- MOTHER, right of, under Statute of Distributions, 262.
- MUSICAL compositions, copyright in, 180.

N.

- NAVY, wills and administration to seamen in the, 236, 244, 261.
- NECESSARIES, husband bound to supply his wife with, 280, 284.
- NEGOCIABLE securities, title to, 290.
 See BILLS OF EXCHANGE and PROMISSORY NOTES.
- NEPHEWS, appointment to, 199.
- NEXT OF KIN, right of, to administration, 258.
 their interest vests from the decease of the intestate, 259.
 how traced, 263.
- NOTE of a contract, what is, 38, 69.
- NOTES, promissory, 72, 101.
 not preferred in administration, 95.

- NOTES, promissory, carry interest, 98.
 title to, 290.
- NOTICE of dishonour of bill or note, 74.
 to debtor on assigning the debt, 101, 300.
 to one partner notice to all, 230.
 to trustees on assigning stock, 300.
- NUNCUPATIVE will, 234.
 who may now make, 236.

O.

- OBJECTS of a contract, lawful or unlawful, 76.
- OFFER, acceptance of, 70.
- OFFICER, insolvent, 128.
- OFFICIAL assignees, 115.
- ORDER and disposition, goods in, of bankrupt, 47.
 choses in action in, of bankrupt, 301.
- OWNERSHIP, personal property the subject of absolute, 7, 9.

P.

- PALATINE courts, superior courts of record, 83.
- PARAPHERNALIA, 273.
- PARLIAMENT, the supreme court, 83.
- PAROL contracts, 66.
- PARTICULAR lien, 26.
- PARTNERS, liability of, 225.
 bankruptcy of, 226.
 ostensible, 228.
 retiring, *ib.*
 deceased, *ib.*
 by participation in profits, 229.
 liability for each other's acts, *ib.*
 notice to one notice to all, 230.
- PARTOWNERS of ships, 50.
- PATENT, 171.
 term of, 172.
 for new manufactures only, 173.
 first inventor of, *ib.*
 specification of, 174.
 vesting of, in more than twelve persons, 175.
 license to use, 176.
 Scotch and Irish, *ib.*
 assignment of, 177.
 form of letters-patent, 310.
- PAWN, 25, 44.

- PAYEE, 72.
- PAYMENT of debts, 102.
 of interest, 103.
 of debts in bankruptcy, 119.
- PENALTIES, limitation of actions for, 297.
- PENDENTE *lite*, administrator, 260.
- PERIODICAL works, copyright in, 179.
- PERPETUITIES, 194.
 in exercise of powers, 201.
- PERSONAL property, the subject of absolute ownership, 7.
 annuity, 148.
- PETITIONING creditor on bankruptcy, 112.
 compounding with, *ib.*
- PIOUS uses, 256.
- PLANS, copyright in, 182.
- PLEDGE of goods, 25, 44.
 by factor or agent, 293.
- POLICY of insurance, 133.
 notice of transfer of, 302.
- PORTIONS, appointment of, 196.
 vesting of, charged on land, 203.
 satisfaction of, by legacies, 251.
- POSSESSION, choses in, 4.—See CHOSSES IN POSSESSION.
 goods in, of bankrupt, 47.
- POSSIBILITY, 187.
 how alienable, *ib.*
- POWER of attorney, 100.
 construed strictly, 292.
 form of a, 317.
- POWERS, 195.
 of appointment amongst children, 196, 198.
 assignees of bankrupt or insolvent may exercise, 195.
 frauds on, 200.
 perpetuity in exercise of, 201.
 to appoint new trustees, 209.
 form of power to appoint new trustees, 326.
 given to married women, 284.
 form of, of appointment amongst children, 319.
 form of, given to a wife, 321.
- PRIMOGENITURE, remarks on, 267.
- PRINTS, copyright in, 182.
- PROBATE of wills, 241.
 acts of executor before, *ib.*
 in which court to be taken out, 242.
 evidence required on, *ib.*
 in common form, 243.
 per testes, *ib.*

- PROBATE, stamp duties on, 244.
 of seamen's wills, *ib.*
 PROFITS of partnership, participation in, 229.
 PROMISE implied, 61.
 insufficient of itself to form a contract, 65.
 PROMISSORY notes, 72, 101.
 not preferred in administration, 95.
 carry interest, 98.
 title to, 290.
 PROOF of debts in bankruptcy, 115.
 PROPERTY in goods, 21.
 requisite to a grant, 31.
 PROTEST, 74.
 PROVISIONAL committee-man, liability of, 231.
 PUBLIC officer of banking company, 162.
 PURCHASE of land, investment of settled funds in, 207.
 PURCHASER from executor not bound to see to the application of his
 purchase money, 245.

R.

- RASURE of deeds, 75.
 REAL estate, charge of, for payment of debts, 298.
 REAL securities, what are, 205.
 in Ireland, 206.
 RECEIPT by surviving joint owner, when good, 221.
 by one executor a good discharge, 239.
 by executor on sale a good discharge, 245.
 by husband of wife's chose in action, 274, 277.
 RECEIPT clause in settlements, 209.
 form of a, 321.
 RECOGNIZANCE, 91.
 limitation of actions on, 295.
 RECORD, debts of, 83.
 courts of, 88.
 of proceedings in bankruptcy, 123.
 REFERENCE to arbitration, 138.
 revocation of, 140.
 by assignees in bankruptcy or insolvency, 232.
 REGISTRATION of ships, 48.
 of transfers of ships, 53.
 of joint stock companies, 163.
 of banking companies, 166.
 of copyrights, 130.
 REIMBURSEMENT of trustees, 211.
 form of proviso for, in a settlement, 228.
 RELEASE by one joint obligee bars all, 217.

- RELEASE of one joint debtor discharges all, 223.
of one joint and several debtor, 225.
- RENT, arrears of, 92.
payment of, in bankruptcy, 120.
limitation of actions for, 295, 296.
- RENUNCIATION of office of executor, 240.
- REPLEVIN, action of, 3.
limitation of action of, 294.
- REPUTED ownership, 45, 47.
of chose in action, 301.
- RESIDUARY legatee, rights of, 253.
- RESIDUE, former right of executor to, 255.
right of next of kin to, *ib.*
form of assignment of a share in, 316.
- RESPONDENTIA, 136.
- RESTRAINT on anticipation, 282.
on marriage, 269.
- REVERSIONARY chose in action of wife, assignment of, 278.
- REVIEWS, copyright in, 179.
- REVOCATION of the trusts of a settlement, 215.
of a will, 236.
- ROYAL family, no duty on legacies to, 247.
- RULE in *Shelley's case*, 192.

S.

- SALE of goods, 34.
of goods in market overt, 291.
of goods by factor or agent, 292.
of lands, direction for, converts them into money in equity, 208.
- SALVAGE, 27.
- SATISFACTION of debts by legacies, 250.
of portions by legacies, 251.
- SCHEDULE of insolvent, 128.
- SCIRE facias to revive a judgment, 86.
- SCOTCH patent, 176.
- SCULPTURES, copyright in, 183.
- SEAMEN, wills of, 236.
probate of wills of, 244.
administration to effects of, 261.
- SECURITIES of creditor, how affected by composition, 104.
proof in bankruptcy by creditors holding, 116.
government, what are, 205.
real, what are, *ib.*
real, in Ireland, 206.
stolen, 291.

- SEPARATE use, trusts for woman's, 281, 282.
 form of a trust for, 319.
- SEPARATION of husband and wife, 284.
- SETTLEMENT of personal property, 186, 270.
 wife's equity for a, 277.
 covenant for, of wife's future property, 212.
 covenant for, of husband's property, 213.
 voluntary, void as against creditors, 214.
 voluntary, binding on settlor, 215.
 for settlor's own benefit revocable, *ib.*
 voluntary, of personal estate not void against subsequent
 purchasers, 216.
 stamps on, *ib.*
 on marriage, 214, 270.
 by infants, 271.
 form of a marriage settlement of residuary personal estate
 and stock in the funds, 315.
- SHARES in joint stock companies, 158.
 transfer of, 160, 164, 166.
 sale of, 168.
 notice of transfer of, 302.
 title to, 303.
- SHELLY's case, rule in, 193.
- SHIPS, 48.
 husband, 51.
 transfer of property in, *ib.*
 no stamp duty on transfer of, 52.
 mortgage of, 53.
 insurance of, 135.
- SHOPS in the city of London are market overt, 291.
- SIGNATURE to contracts, 69.
- SIMPLE contract debts, 95.
 limitation of actions for, 297.
- SISTERS, right of, under Statute of Distributions, 262.
- SOLDIERS, wills of, 235, 236.
 probate of wills of, 244.
 administration to effects of, 261.
- SOLICITOR, lien of, 28.
 not liable as such to the bankrupt laws, 108.
 cannot charge for professional trouble as trustee, 210.
- SPECIALTY debts, 91.
 limitation of action for, 295.
- SPECIFIC legacy, 248.
- SPECIFICATION of patent, 174.
- STAMP duty, none on transfer of ships, 52.
 on awards, 147.
 on settlements, 216.

- STAMP duty on probates, 244.
 on legacies, 246.
 on letters of administration, 260.
 on shares of intestate's estates, 265.

STATUTES cited.

- 13 Edw. I. c. 18, (*elegit*), 45.
 13 Edw. I. c. 19, (*intestates*), 257.
 13 Edw. I. c. 45, (*scire facias*), 86.
 4 Edw. III. c. 7, (*action by executors*), 56.
 31 Edw. III. c. 11, (*administrator*), 257.
 21 Hen. VIII. c. 5, (*next of kin*), 258.
 27 Hen. VIII. c. 10, (*Statute of Uses*), 11, 64, 189.
 32 Hen. VIII. c. 37, (*arrears of rent*), 276.
 37 Hen. VIII. c. 9, (*interest*), 5, 97.
 2 & 3 Phil. & Mary, c. 7, (*stolen horses*), 292.
 13 Eliz. c. 5, (*gifts for defrauding creditors*), 43, 46, 64, 214.
 13 Eliz. c. 7, (*bankrupts*), 109, 113.
 13 Eliz. c. 20, (*charges on benefices*), 80.
 27 Eliz. c. 4, (*voluntary settlements*), 216.
 31 Eliz. c. 12, (*stolen horses*), 292.
 21 Jac. I. c. 3, (*patents*), 171, 172.
 21 Jac. I. c. 16, (*Statute of Limitations*), 65, 70, 294, 297.
 22 & 23 Car. II. c. 10, (*distribution*), 259, 261, 262.
 29 Car. II. c. 3, (*Statute of Frauds*)
 s. 4, (*contracts in writing*), 39, 66, 214, 246.
 s. 5, (*will of real estate*), 235.
 s. 16, (*writ of fieri facias*), 46.
 s. 17, (*sale of goods*), 36, 153, 168.
 ss. 19—21, (*nuncupative testament*), 234.
 s. 22, (*revocation of will of personal estate*), 235.
 s. 23, (*soldiers and mariners*), 236.
 s. 25, (*husband*), 262, 276.
 1 Jac. II. c. 17, (*distribution*), 261, 262.
 4 & 5 Will. & Mary, c. 2, (*custom of York*), 233.
 7 & 8 Will. III. c. 38, (*custom of Wales*), 233.
 8 & 9 Will. III. c. 11, (*judgments*), 95.
 9 & 10 Will. III. c. 15, (*arbitration*), 139, 144, 145.
 2 & 3 Anne, c. 5, (*custom of York*), 233.
 3 & 4 Anne, c. 9, (*promissory notes*), 5, 102.
 4 Anne, c. 16, (*nuncupative testaments*), 234.
 4 & 5 Anne, c. 16, (*bond debts*), 94.
 7 Anne, c. 25, (*promissory notes*), 5, 102.
 8 Anne, c. 19, (*copyright*), 178.
 9 Anne, c. 14, (*money won at play*), 80.
 12 Anne, stat. 2, c. 16, (*usury*), 8.
 1 Geo. I. stat. 2, c. 19, (*stock*), 151, 157.
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STATUTES cited.

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- 9 Geo. II. c. 36, (mortmain,) 251.
- 19 Geo. II. c. 37, (ship insurance,) 134, 136.
- 7 Geo. III. c. 38, (copyright in prints,) 182.
- 14 Geo. III. c. 48, (life insurance,) 134.
- 14 Geo. III. c. 78, (metropolitan building act,) 135.
- 17 Geo. III. c. 30, (bills of exchange,) 73.
- 17 Geo. III. c. 57, (copyright in prints, &c.) 182.
- 36 Geo. III. c. 52, (legacy duty,) 237, 247, 248.
- 38 Geo. III. c. 71, (copyright in sculptures, &c.) 183.
- 38 Geo. III. c. 87, (infant and absent executor,) 238, 259.
- 39 & 40 Geo. III. c. 98, (accumulations,) 195.
- 41 Geo. III. c. 107, (copyright,) 178.
- 46 Geo. III. c. 135, (bankruptcy,) 118.
- 48 Geo. III. c. 88, (bills of exchange,) 73.
- 48 Geo. III. c. 123, (discharge of small debtors,) 131, 132.
- 49 Geo. III. c. 121, (bankruptcy,) 118.
- 54 Geo. III. c. 56, (copyright in sculptures, &c.) 183.
- 54 Geo. III. c. 156, (copyright,) 178.
- 55 Geo. III. c. 184, (stamps,) 147, 244, 247, 260, 261, 265.
- 56 Geo. III. c. 60, (unclaimed dividends,) 299.
- 56 Geo. III. c. 137, (bankruptcy,) 118.
- 3 Geo. IV. c. 29, (warrants of attorney and cognovits,) 85, 87, 88.
- 4 Geo. IV. c. 41, (ships,) 48.
- 4 Geo. IV. c. 83, (factors and agents,) 293.
- 6 Geo. IV. c. 16, (bankruptcy,)
 - s. 2, (traders,) 107, 108.
 - s. 3, (act of bankruptcy,) 109.
 - s. 4, (assignment in trust for creditors,) 105.
 - s. 5, (lying in prison, &c.) 109.
 - s. 8, (petitioning creditor,) 113.
 - s. 13, (petitioning creditor's bond,) 112.
 - s. 24, (adjudication,) 114.
 - ss. 36, 37, (examination,) 119.
 - s. 50, (set-off,) 116.
 - s. 51, (proof,) 115.
 - ss. 53—58, (proof,) 116.
 - s. 60, (expunging proof,) *ib.*
 - s. 61, (assignees,) 117.
 - s. 62, (proof by joint creditors,) 227.
 - ss. 63, 64, (estate vested in assignees,) 102, 115, 118, 122.
 - s. 72, (reputed ownership,) 47.
 - s. 73, (voluntary assignment,) 214.
 - s. 74, (rent,) 120.

STATUTES cited.

- 6 Geo. IV. c. 16, s. 77, (powers,) 195.
 ss. 81, 82, 84, (assignees,) 118.
 s. 88, (suits, arbitration, &c.) 232.
 ss. 106, 107, (dividends,) 119.
 s. 108, (judgments,) 89, 119.
 s. 109, (dividends,) 119.
 s. 112, (wearing apparel,) 117.
 s. 121, (certificate,) 223.
 s. 122, (certificate,) 121.
 s. 127, (second bankruptcy,) 123.
 s. 131, (promise to pay barred debts,) 65, 70.
 s. 132, (surplus,) 121.
 s. 133, 134, (composition,) *ib.*
 s. 135, (alien, &c.) 108.
- 6 Geo. IV. c. 41, (stamp duty on transfers of ships,) 52.
- 6 Geo. IV. c. 94, (factors and agents,) 293.
- 6 Geo. IV. c. 109, (ships,) 48.
- 6 Geo. IV. c. 110, (ships,) *ib.*
- 7 Geo. IV. c. 46, (banking companies,) 162.
- 7 Geo. IV. c. 57, (insolvency,) 126.
- 7 & 8 Geo. IV. c. 29, (stolen goods,) 292.
- 9 Geo. IV. c. 14, (written contracts,) 37, 65, 66, 70, 71, 223, 297.
- 9 Geo. IV. c. 32, (felony,) 43.
- 9 Geo. IV. c. 92, (savings banks,) 244.
- 10 Geo. IV. c. 56, (friendly societies,) 168, 169.
- 11 Geo. IV. & 1 Will. IV. c. 20, (seamen's wills,) 236, 245.
- 11 Geo. IV. & 1 Will. IV. c. 38, (insolvency,) 126.
- 11 Geo. IV. & 1 Will. IV. c. 40, (executors trustees of residue,) 255.
- 11 Geo. IV. & 1 Will. IV. c. 46, (illusory appointments,) 179.
- 11 Geo. IV. & 1 Will. IV. c. 60, (trustees,) 153.
- 11 Geo. IV. & 1 Will. IV. c. 65, (infants, idiots and lunatics,) 154.
- 1 Will. IV. c. 7, (judgments,) 89.
- 1 & 2 Will. IV. c. 32, (game act,) 19, 20.
- 1 & 2 Will. IV. c. 56, (bankruptcy court,) 83, 102, 109, 113, 115, 117, 120, 121, 123, 232.
- 2 & 3 Will. IV. c. 40, (seamen's wills,) 245.
- 2 & 3 Will. IV. c. 114, (record of proceedings in bankruptcy,) 123.
- 3 & 4 Will. IV. c. 15, (copyright in dramatic works,) 180.
- 3 & 4 Will. IV. c. 27, (limitations,) 295—297.
- 3 & 4 Will. IV. c. 42, s. 2, (actions by and against executors,) 56, 58.
 s. 3, (limitation,) 295, 297.

STATUTES cited.

- 3 & 4 Will. IV. c. 42, s. 4, (disabilities,) 296, 297.
 s. 5, (acknowledgment,) 296.
 ss. 28, 29, (interest,) 98.
 s. 39, (arbitration,) 140, 142.
 ss. 40, 41, (witnesses on arbitration,) 140,
 141.
- 3 & 4 Will. IV. c. 54, (ships,) 48.
- 3 & 4 Will. IV. c. 55, (ships,) 48, 53.
- 3 & 4 Will. IV. c. 105, (dower,) 250.
- 4 & 5 Will. IV. c. 22, (apportionment of income,) 190, 191.
- 4 & 5 Will. IV. c. 25, (seamen's pay,) 244, 245.
- 4 & 5 Will. IV. c. 29, (real securities in Ireland,) 206.
- 4 & 5 Will. IV. c. 40, (friendly societies,) 168, 169.
- 4 & 5 Will. IV. c. 94, (public officer,) 162.
- 5 & 6 Will. IV. c. 29, (bankruptcy,) 83.
- 5 & 6 Will. IV. c. 41, (securities for illegal consideration,) 80,
 81, 122.
- 5 & 6 Will. IV. c. 83, (patents,) 172, 173, 175.
- 6 & 7 Will. IV. c. 32, (building societies,) 169, 170.
- 6 & 7 Will. IV. c. 59, (copyright in prints, &c.) 182.
- 6 & 7 Will. IV. c. 77, (dioceses,) 242.
- 7 Will. IV. & 1 Vict. c. 26, (wills,) 157, 192, 233, 234, 235,
 236, 243, 253, 254.
- 7 Will. IV. & 1 Vict. c. 73, (public officer,) 162.
- 1 & 2 Vict. c. 96, (banking companies,) 162.
- 1 & 2 Vict. c. 110, ss. 9, 10, (execution of warrants of attorney,) 86.
 s. 12, (seizure of notes and securities,) 102, 214.
 s. 13, (judgments a charge on real estate,) 120.
 ss. 14, 15, (charging stock,) 155, 156, 170, 214.
 s. 16, (imprisonment,) 90.
 s. 17, (interest on judgment debt,) 89.
 s. 22, (judgment of inferior courts,) 91.
 s. 27, (Insolvent Court,) 84.
 s. 35, (discharge,) 127.
 s. 36, (petition by creditor,) *ib.*
 s. 37, (vesting order,) *ib.*
 s. 39, (petitioning an act of bankruptcy,) 112.
 s. 45, (assignees,) 128.
 s. 47, (sale,) *ib.*
 s. 48, (mortgage,) *ib.*
 s. 49, (powers,) 195.
 s. 51, (debts, how sued for,) 102, 232.
 s. 55, (benefice,) 128.
 s. 56, (officer,) *ib.*
 s. 57, (reputed ownership,) 45, 47, 53.

STATUTES cited.

- 1 & 2 Vict. c. 110, s. 59, (voluntary preference,) 128.
 s. 60, (warrant of attorney,) 85, 88.
 s. 61, (bill of sale, &c.) 45, 89.
 s. 62, (dividend,) 128.
 s. 69, (schedule,) 129.
 ss. 70, 71, 72, (examination,) *ib.*
 s. 75, (discharge,) *ib.*
 ss. 76, 77, 78, (postponement of discharge,) *ib.*
 s. 79, (costs,) 130.
 s. 80, (annuities,) *ib.*
 ss. 87, 88, 89, (future execution,) *ib.*
 ss. 90, 91, (freedom from execution,) *ib.*
- 2 & 3 Vict. c. 11, (bankruptcy,) 118.
 2 & 3 Vict. c. 29, (bankruptcy,) 89, 119.
 2 & 3 Vict. c. 37, (usury,) 81.
 2 & 3 Vict. c. 54, (custody of infants,) 286.
 2 & 3 Vict. c. 67, (patents,) 172.
 3 & 4 Vict. c. 73, (friendly societies,) 168.
 3 & 4 Vict. c. 82, (stock, judgments,) 156, 214.
 3 & 4 Vict. c. 110, (loan societies,) 169.
 3 & 4 Vict. c. 111, (banking companies,) 162.
 5 Vict. c. 5, (Court of Exchequer in equity,) 155.
 5 & 6 Vict. c. 39, (factors and agents,) 293.
 5 & 6 Vict. c. 45, (copyright,) 178, 179, 180, 181.
 5 & 6 Vict. c. 85, (banking companies,) 162.
 5 & 6 Vict. c. 100, (copyright in designs,) 185.
 5 & 6 Vict. c. 116, (insolvency,) 130, 131.
 5 & 6 Vict. c. 122, (bankruptcy.)
 s. 3, (fiat and bond,) 109, 112.
 s. 4, (fiat,) 109, 114.
 s. 7, (act of bankruptcy,) 112
 s. 8, (concerted bankruptcy,) 110.
 s. 9, (petitioning creditor,) 112.
 s. 10, (traders, who,) 107.
 ss. 11, 12, (affidavit of debt,) 110.
 ss. 13, 14, 15, 16, 17, (admission of debt,) 110, 111.
 s. 20, (judgment debt,) 111.
 s. 21, (decree of court,) *ib.*
 s. 22, (declaration of insolvency,) 109.
 s. 23, (freedom from arrest,) 114.
 s. 24, (Gazette evidence,) 115.
 s. 27, (dividends,) 119.
 ss. 28, 29, (wages,) 120.
 s. 31, (joint creditor bankrupt,) 221.
 s. 37, (certificate,) 121, 223.

STATUTES cited.

- 5 & 6 Vict. c. 122, (bankruptcy,) s. 38, (frauds,) 121.
 s. 39, (certificate,) 122, 227.
 s. 40, (contracts to forbear opposition,) 122.
 s. 41, (penalty,) *ib.*
 s. 43, (promise to pay barred debt,) 65, 70.
 ss. 44, 45, (allowance,) 109, 121.
 s. 48, (official assignees,) 115.
 s. 49, (creditors' assignees,) 117.
 s. 59, (country commissioners,) 113.
 s. 66, (commissioners,) 83.
 s. 93, (alien, &c.,) 108, 109.
- 6 & 7 Vict. c. 65, (copyright in designs,) 185.
- 6 & 7 Vict. c. 66, (index to warrants of attorney,) 88.
- 7 & 8 Vict. c. 12, (international copyright,) 183, 184.
- 7 & 8 Vict. c. 32, (bank notes,) 73.
- 7 & 8 Vict. c. 66, (aliens,) 42.
- 7 & 8 Vict. c. 69, (patents,) 172, 175.
- 7 & 8 Vict. c. 70, (arrangements between debtors and creditors,) 105.
- 7 & 8 Vict. c. 76, (transfer of property,) 187.
- 7 & 8 Vict. c. 84, (Metropolitan Building Act,) 135.
- 7 & 8 Vict. c. 96, (insolvency,) 45, 47, 53, 88, 89, 90, 102, 109, 130, 131, 132, 195, 232.
- 7 & 8 Vict. c. 110, (joint stock companies,) 162, 163, 164, 231.
- 7 & 8 Vict. c. 111, (bankruptcy of joint stock companies,) 167, 168.
- 7 & 8 Vict. c. 113, (banking companies,) 165, 166, 167, 231.
- 8 & 9 Vict. c. 16, (companies clauses consolidation act,) 160, 161, 231.
- 8 & 9 Vict. c. 18, (lands clauses consolidation,) 159.
- 8 & 9 Vict. c. 20, (railways clauses consolidation,) *ib.*
- 8 & 9 Vict. c. 48, (bankrupt's oath,) 119.
- 8 & 9 Vict. c. 62, (unclaimed dividends,) 299, 300.
- 8 & 9 Vict. c. 76, (legacy duty,) 237, 247.
- 8 & 9 Vict. c. 88, (ships,) 48.
- 8 & 9 Vict. c. 89, (ships,) 48, 50, 52.
- 8 & 9 Vict. c. 93, (copyright in colonies,) 181.
- 8 & 9 Vict. c. 97, (stock,) 154, 158.
- 8 & 9 Vict. c. 102, (usury,) 81.
- 8 & 9 Vict. c. 106, (real property,) 32, 187.
- 8 & 9 Vict. c. 109, (gaming and wagering,) 80.
- 8 & 9 Vict. c. 127, (execution,) 47, 90.
- 9 & 10 Vict. c. 27, (friendly societies,) 168, 169.
- 9 & 10 Vict. c. 93, (death by accident compensation,) 57.
- 9 & 10 Vict. c. 95, (small debts,) 6, 84, 90.
- 10 & 11 Vict. c. 14, (markets clauses consolidation,) 159.
- 10 & 11 Vict. c. 15, (gas clauses consolidation,) *ib.*
- 10 & 11 Vict. c. 17, (water clauses consolidation,) *ib.*

STATUTES cited.

- 10 & 11 Vict. c. 27, (harbours clauses consolidation,) 159.
- 10 & 11 Vict. c. 34, (paving clauses consolidation,) *ib.*
- 10 & 11 Vict. c. 53, (loan societies,) 169.
- 10 & 11 Vict. c. 65, (cemeteries clauses consolidation,) 159.
- 10 & 11 Vict. c. 78, (joint stock companies,) 162, 163, 164.
- 10 & 11 Vict. c. 83, (aliens,) 42.
- 10 & 11 Vict. c. 95, (copyright in colonies,) 182.
- 10 & 11 Vict. c. 96, (trust funds,) 212.
- 10 & 11 Vict. c. 98, (ecclesiastical courts,) 242.
- 10 & 11 Vict. c. 102, (bankruptcy and insolvency,) 120, 127, 130, 131.

STATUTES merchant and staple, 91.

STOCK in trade, assignment of, 31.

in the funds, 149.

- is personal estate, 151.
- jobbing, 80, 152.
- transfer of, 151, 153.
- contract for sale of, 153.
- distringas on, 154, 302.
- charge of judgment on, 155.
- transmission of, by will, 156.
- unclaimed dividends on, 299.
- notice to trustee on assignment of, 300.

STOLEN goods, 291.

STOP order, 302.

STOPPAGE in transitu, 40.

SUBMISSION to arbitration, 138, 140.

by assignees in bankruptcy or insolvency, 232.

SUPERIOR courts of record, 83.

SURETIES, 98.

discharge of, 99.

proof of debts paid by, 116.

SURVIVORSHIP amongst joint owners, 217, 218.

- none in equity of joint securities, 220.
- none amongst owners in common, 222.
- amongst joint debtors, 223.
- as to joint and several debtors, 225.
- of office of executor, 240.

T.

TAIL, estate, none in personal property, 191.

TENTERDEN, Lord, his act, 70, 301.

TESTAMENTARY alienation, growth of right of, 233.

See WILL.

TIMBER, 15, 17.

TIMBER trees, what are, 17.

TITLE, 290.

to money and negotiable securities, *ib.*

to chattels personal, 291.

to stolen goods, *ib.*

to horses stolen, 292.

under factors and agents, *ib.*

warranty of, 293.

under statutes of limitation, 294, 295, 296, 297, 298.

to unclaimed dividends, 299.

to choses in action by notice, 300, 301, 302.

through deeds, wills, &c. 302.

abstract of, 302.

covenants for, 303.

to shares, *ib.*

comparison of, to real and personal estate, 304.

deeds, 9.

solicitor's lien on, 28.

TOMBSTONE, 13.

TRADE, contracts in restraint of, 78.

bankruptcy of partners in, 226.

liability of executor carrying on, 228.

customs of, 294.

TRADER, who is within the bankrupt laws, 107.

TRANSFER of stock, 151, 153.

TROVER and conversion, 22, 44.

recovery in, 41.

TRUST, though voluntary, enforced in equity, 33.

settlements by means of, 189.

funds, act for better securing, 212.

for payment of creditors, when revocable, 215.

for wife's separate use, 281.

form of, of stock, 317.

TRUSTEES, transfer of stock when they refuse, 153.

infant, *ib.*

power to appoint new, 209.

costs of, 210.

responsibilities of, 210, 211.

indemnity and reimbursement of, 211.

act for relief of, 212.

of personal estate made joint owners, 218.

notice to, on assignment of choses in action, 300.

inquiry of, as to prior assignments of choses in action, 301.

form of usual clauses in settlement as to, 326.

U.

- UMPIRE, 145.
- UNCERTIFICATED bankrupt, 122.
- UNCLAIMED dividends, 299.
- UNLAWFUL contracts, 63, 77.
- USURIOUS contracts, 81.

V.

- VENDOR's lien, 39.
- VESTED interests, 192.
 - the courts lean to, 202.
 - giving to children by settlement, 203.
- VESTING order in insolvency, 127.
- VOLUNTARY trust enforced, 33.
 - bonds, 95.
 - preference in bankruptcy, 120.
 - in insolvency, 128.
 - settlement, void as against creditors, 214.
 - binding on settlor, 215.
 - of personal estate not void as against subsequent purchasers, 216.

W.

- WAGERS void, 80.
- WAGES to servants of bankrupt, 120.
- WALES, custom of, 233, 265.
- WARRANT of attorney, 85.
 - execution and attestation of, 86.
 - to be filed within twenty-one days, 87.
 - in case of bankruptcy or insolvency, 88.
 - executed by insolvent debtor, 130.
- WARRANTY on sale of goods, 293.
- WASTE, tenant without impeachment of, 17.
 - being impleaded of, *ib.*
- WEARING apparel, 47.
 - of bankrupt, 117.
 - of insolvent, 127.
- WIDOW, usually preferred in grant of administration, 258.
 - her share under the Statute of Distribution, 262.
 - when deprived of her distributive share by settlement, 271.
- WIDOWHOOD, gift to woman during, 269.

WIFE, executrix, 238.

covenant to settle her future property, 212.

no duty on legacy to, 247.

a feme covert, 272.

her chattels personal belong to her husband, 273.

her paraphernalia, 273.

her legal choses in action, 274, 275.

her equitable choses in action, 276.

her equity to a settlement, 277.

assignment of her reversionary choses in action, 278.

her husband's liability to her debts, 279, 286.

her will of her personal estate, 281.

trusts for her separate use, 274, 281.

restraint on her anticipation, 282.

powers may be exercised by, 196, 284.

separation of, 284.

her alimony, 286.

See MARRIED WOMAN.

WILL, 233.

attestation of, 235.

revocation of, 236.

executor of, 238.

probate of, 241, 242.

ecclesiastical jurisdiction over, 241.

of wife by husband's authority, 281.

WITNESSES, examination of, by arbitrators, 140.

to a will, 235.

WRITING, what contracts to be in, 36, 39, 66.

Y.

YEAR, agreement not to be performed within a, 67, 68.

of executor, 245.

of administrator, 259.

YORK, custom of province of, 233, 265.

YOUNGER children, 199.

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